SUPREME COURT, U. S.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES,

Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SPECIAL EXPLANATORY NOTE

Pursuant to Rule 23 (f) there has been prepared and will be filed a Separate Appendix to this Petition for Certiorari and for convenience the Table of Contents of the Separate Appendix is reprinted below for reference.

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OCTOBER TERM, 1973

No. _____

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES,

Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, The Wichita Indian Tribe of Oklahoma and Bands and Groups of Indians which have been or which are Affiliated with the Wichita Indian Tribe of Oklahoma, including but not Limited to the Wichita, Wacos, Keechis, and Towaconies, respectfully petition the Court to grant a writ of certiorari to the United States Court of Claims to review its decision entered in the above

entitled case on June 20, 1973, and in which case the said Court entered its Order denying Motions for rehearings to alter or amend said judgment, which Order denying rehearings was entered on September 28, 1973.

OPINIONS BELOW

The opinion of the Court of Claims was entered on June 20, 1973, and is not yet reported in the Court of Claims decisions, but is reported in the Federal Reporter, Second Series, at 479 F.2d 1369 (1973) and is reprinted as Appendix A to the Separate Appendix to this Petition.

The order denying motions for rehearing entered September 28, 1973, to alter or amend the judgment entered by the Court of Claims on June 20, 1973, is unreported and is printed as Appendix B to the Separate Appendix to this Petition.

The order of the Indian Claims Commission granting motion of the Wichita Tribe, et al., to intervene, which order is germane to this Petition was entered on the 10th day of February, 1971, 24 Ind. Cl. Comm. 405 and is reprinted as Appendix C to the Separate Appendix to this Petition.

An opinion of the Indian Claims Commission styled, "Lipan Apache v. United States" that is germane to this Petition for the reason same was referred to and adopted in the order allowing the Wichita Tribe, et al. to intervene as set out in Appendix C supra is an opinion of said Commission dated November 5, 1969,

22 Ind. Cl. Comm. 1 and is reprinted as Appendix D to the Separate Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of the Indian Claims Commission Act of August 13, 1946, c. 959, §20, 60 Stat. 1049, 1055, as supplemented and amended by Act of September 8, 1960, Pub. L. 86-722, 74 Stat. 821, 829 (25 U.S.C. 70s (c); and also under 28 U.S.C. §1255.

The above Indian Claims Commission Act was amended and extended to April 10, 1977, by the Acts of June 24, 1956, 70 Stat. 624; June 16, 1961, Pub. L. 87-48, 75 Stat. 92; April 10, 1967, Pub. L. 90-9, 81 Stat. 11; and March 20, 1972, Pub. L. 92-265, 86 Stat. 114.

The decision of the Court of Claims rendered on appeal appealing from decisions of the Indian Claims Commission was entered on June 20, 1973, and a duly filed motion for rehearing was overruled on September 28, 1973, and this Petition for Certiorari was filed within ninety days of that date, 28 U.S.C. §1255, June 25, 1948, c. 646, 62 Stat. 928.

QUESTION PRESENTED

Shall intervening claimants be allowed or permitted to intervene after August 13, 1951, in pending claims timely filed before August 13, 1951, in the Indian Claims Commission pursuant to

the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049-1055, 25 U.S.C. 70a-70v, if the intervening claimants are claiming adversely to the claimants who filed before August 13, 1951.

AUTHORITIES INVOLVED

Indian Claims Commission Act, August 13, 1946, c. 959, 60 Stat. 1050, 1052, 1054 (25 U.S.C. 70a, 70k, and 70s (c)) reprinted as Appendix F in Separate Appendix to this Petition.

Federal Rules of Civil Procedure, 28 U.S.C. Rule 24. INTERVENTION

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an

applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. * * * *

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

Rules of the Court of Claims of the United States, 28 U.S.C. Rule 28.
INTERVENTION

(a) WHEN PERMITTED: Upon timely application, anyone may be permitted by the court to intervene in an action (1) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action, or (2) where the applicant has a pecuniary interest in the subject matter of the main action.

(b) PROCEDURE. * * * *

General Rules of Procedure promulgated by the Indian Claims Commission as set out in the Federal Register, Vol. 33, No. 121, Friday, June 21, 1968, Section 503.13 AMENDED AND SUPPLEMENTAL PLEADINGS.

(a) AMENDMENTS. (1) A party may amend its pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for hearing, it may so amend it at any time within 20 days after it is served. Otherwise a party may amend its pleading only by leave of the Commission or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time allowed for responding to an original pleading, unless the Commission otherwise orders.

(2) * * * *

(b) * * * *

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

STATEMENT OF THE CASE

The Petitioners herein on March 16, 1970, filed their Complaint in Intervention and in the Alternative an Original Petition in Docket 257 before the Indian Claims Commission which Docket at that time was styled The Kiowa, Comanche and Apache Tribes of Indians, Petitioners v. The United States of America, Defendant. A copy of the Complaint in Intervention together with a portion of the exhibits is set out in the Separate Appendix to this Petition as Appendix G and contains pages 1g through 64 g inclusive. The Complaint was filed pursuant to Section 2 of the Indian Claims Commission Act and the intervenors stated that they were the beneficiaries of special legislation by an Act of Congress approved June 4, 1924, (43 Stat. 366) which Act of Congress gave legislative authority to the Petitioners herein to file an action for claims against the United States in the Court of Claims. Judgment was rendered on said action by the Court of Claims in 1939 styled, Wichita Indians v. United States, 89 Ct. 378 and the Court of Claims held that the Act of Congress approved June 4, 1924, failed to grant jurisdiction to the Court of Claims to award compensation to the Petitioners for the wrongful taking of their aboriginal lands without compensation to the Petitioners. The basic reason given by the Court of Claims for this decision was that the Quapaw Indians had ceded the lands in question in Oklahoma and Texas to the United States by the Treaty of August 24, 1818, (7 Stat. 176) and the Court

of Claims could not abrogate the Treaty between the Quapaws and the United States.

The Complaint in Intervention further stated that the Court of Claims in its decision in 1939 also referred to an early decision rendered by the Court of Claims in 1899, 34 Ct. Cls. 17 and the Complaint further states that the early decision of the Court of Claims in 1899 held that the Petitioners, that is, the Wichita Tribe et al., failed to prove aboriginal title to certain lands in Oklahoma and Texas, but on appeal to the United States Supreme Court, it was later determined by the United States Supreme Court, 179 U.S. 494 that the Court of Claims in 1899 had no jurisdiction to make determinations concerning aboriginal title because the litigation involved in 1899 was special legislation concerning the title to the Wichita reserve lands and jurisdiction was not given to the Court of Claims relative to determining aboriginal title to the lands in question.

The Complaint in Intervention further stated other germane facts including the fact that evidence had been adduced since 1939 primarily as the result of a study by the National Science Foundation for a pilot study of the archeology and ethnohistory of the Wichita Tribe and the National Science Foundation determined that the Wichita Tribe had aboriginal Indian title to most of Oklahoma and a considerable part of Texas, and the Complaint further stated that if intervention was permitted in Docket 257 there should

be no great difficulty in proving that the Wichita Tribe did in fact have aboriginal title to the lands claimed.

Your Petitioners in the said Complaint in Intervention further alleged that the Quapaw Indian Tribe filed a claim before the Indian Claims Commission claiming aboriginal title to Western Oklahoma, but their claim was denied by the Indian Claims Commission and the Court of Claims on appeal. The Indian Claims Commission and the Court of Claims stated that the area claimed was in fact occupied by the Caddo Tribe and the Wichita Tribe, 1 Ind. Cl. Comm. 474, 128 Ct. Cl. 45, 120 F. Supp. 283.

Your Petitioners in said Complaint in Intervention further stated that the Kiowa, Comanche and Apache Tribes of Indians, as the original Petitioners, timely filed a claim before the Indian Claims Commission in Docket 257 which claim was against the United States for the wrongful taking of their lands for which they had aboriginal title; said lands being generally located in Western and Northwestern Texas, Eastern New Mexico, the Western portion of Oklahoma, the Southeastern corner of Colorado and the Southwestern corner of Kansas as bounded and set out in their Complaint and the said Kiowa, Comanche and Apache Tribes in their said Complaint also alleged that they had treaty title to most of said lands as a result of certain treaties as more fully set out in Separate Appendix to this Petition as Appendix G at page 14 g.

Your Petitioners in said Complaint in Intervention further stated that no judgment had been rendered in Docket 257 even though the claim of the Kiowa, Comanche and Apache Tribes had been pending since it had been filed prior to August 13, 1951. Therefore, an Order permitting the Wichita Tribe to intervene should not materially affect the trial in Docket 257.

Your Petitioners in their Complaint in Intervention further stated that the reason that the Wichita Tribe did not file their claim before the Indian Claims Commission for the wrongful taking of their lands for which they had either treaty title or aboriginal title was due to the fact that the Wichita Tribe was without an Attorney and even though a desperate attempt was made to employ legal counsel for the said Tribe prior to August 13, 1951, at which time the normal Statute of Limitations for filing claims expired pursuant to the Indian Claims Commission Act, they were unsuccessful in their attempt to employ legal counsel. It was further alleged that the Wichita Tribe by and through Frank Miller, the Chairman of the Wichita Tribe who had written letters to practically all knowledgeable law firms that were handling claims for Indian Tribes before the Indian Claims Commission and these law firms and lawyers all denied employment because they were of the opinion and had been advised that the decision rendered by the Court of Claims relative to the Wichita Tribe in 1939 was res judicata. Your Petitioners attached copies of

letters to their Complaint from said law firms, including those as shown on pages 56 g and 57 g of the Separate Appendix G for this Petition. The general import of these letters such as the letters from Sonnenschein Berkson Lautmann Levinson & Morse, a prominent law firm in Chicago, Illinois, stated that they would have their research office under the direction of Mr. Felix Cohen research the feasibility of representing the Wichita Tribe and then with the final letter from said firm some three months later denying employment with the statement that all other firms serviced by the research office would doubtless refuse employment based on the advice of Felix Cohen, the director of the research office, that the 1939 decision in the Wichita case was res judicata.

Your Petitioners in their Complaint in Intervention further stated that the advice of Felix Cohen was in error as later determined by the Indian Claims Commission and the Court of Claims in Creek Nation v. United States, 168 Ct. Cl. 483 with the legal determination that the 1939 decision of the Court of Claims in the Wichita case would not be res judicata.

Your Petitioners in their Complaint in Intervention further stated that they had the right to intervene under the authorities and decisions as follows:

> Blackfeet and Ventre Tribe et al., vs. United States, 162 Ct. Cls. 136 (1963)

The Snoqualmie Tribe of Indians vs. United States, 178 Ct. Cls. 570 (1967)

United States vs. Northern Paiute Nation, 183 Ct. Cls. 321 (1968)

The Yankton Sioux Tribe of Indians vs. United States, 175 Ct. Cls. 564 (1966)

Lipan Apache Tribe et al., vs. United States, Opinion of the Indian Claims Commission, Docket No. 22 C issued on November 5, 1969, 22 Ind. Cl. Comm. 1

The Yankton Sioux Tribe of Indians vs. United States, Opinion of the Indian Claims Commission, Docket No. 332 C issued on December 17, 1969, 22 Ind. Cl. Comm. 344.

Many other pertinent allegations were alleged in the said Complaint in Intervention which can be ascertained by reading the Complaint in Intervention as set out in the Separate Appendix to this Petition as Appendix G.

After briefing and oral argument, the Indian Claims Commission entered an Order granting the Motion of the Wichita Tribe to intervene in Docket 257 which Order was entered on the 10th day of February, 1971, and is set out in full as Appendix C in the Separate Appendix to this Petition for Certiorari and the said Order of intervention entered on the 10th day of February, 1971, adopted as the legal authority a prior

decision of the Indian Claims Commission in Lipan Apache v. United States, Docket 22-C, 22 Ind. Cl. Comm. 1 which decision in the Lipan Apache case was entered on the 5th day of November, 1969, and is set out in full as Appendix D in the Separate Appendix for this Petition for Certiorari, at pages 1d through 10 d inclusive.

The Kiowa, Comanche and Apache Tribes of Indians had filed a motion for summary judgment on treaty title in Docket 257 before the Indian Claims Commission and subsequently to the order granting intervention to the Wichita Tribe, legal briefs were filed by all interested parties and the matter was orally argued and at this phase of the litigation the Wichita Tribe by proper pleadings and briefs and arguments promulgated the premise that they were entitled to a portion of the said treaty title lands claimed by the Kiowa, Comanche and Apache Tribes. The Indian Claims Commission entered a judgment against the United States for said treaty title lands which order and judgment was entered on the 9th day of August, 1971. The Indian Claims Commission entered its interlocutory order, 26 Ind. Cl. Comm 101 (1971) and the said interlocutory decision and order gave a summary judgment against the United States for treaty title to approximately 39 million acres of land in Texas and Oklahoma and the said order and judgment of the Indian Claims Commission stated that although the lands belonged primarily to the Kiowa, Comanche and Apache Tribes, the Wichita Tribe in fact had an interest in

in said lands and their proportionate part of the said lands would have to be determined at a later date.

On November 9, 1971, the United States, the Defendant in Docket 257, filed Notice of Appeal to the Court of Claims and the said Notice of Appeal is set out in the Separate Appendix to this Petition as Appendix E, pages 1 e through 3 e. The Notice of Appeal cited that the judgment for treaty title was in error, which judgment or order was entered on the 9th day of August, 1971, and in division 6 of the said Notice of Appeal, the United States stated that the Indian Claims Commission erred as a matter of law when its order of February 10, 1971, was entered allowing the Wichita Tribe to intervene in Docket 257 approximately 20 years after August 13, 1951.

After the appeal was consumated to the Court of Claims, Briefs were filed, oral argument was heard and the Court of Claims on June 20, 1973, entered its opinion and decision and subsequently thereto a Petition for Rehearing was filed by various parties and an Order was entered by the Court of Claims on September 28, 1973, denying the motions and applications for rehearing. The decision of the Court of Claims is Appendix A to the Separate Appendix to this Petition, pages 1 a through 36 a inclusive and the said opinion has been reported in 479 F. 2d 1369 (1973). The Order of the Court of Claims denying rehearing is set out as Appendix B to the Separate Appendix to this Petition

for Certiorari pages 1 b to 2 b inclusive. The opinion of the Court of Claims rendered on June 20, 1973, 479 F. 2d 1369 (1973) adjudged that the order of the Indian Claims Commission allowing the Wichita Tribe to intervene in Docket 257 was in error and should be reversed and it was so ordered by the Court of Claims. If this Court does not issue a Writ of Certiorari relative to that part of the decision concerning the intervention of the Wichita Tribe to the Court of Claims, the Wichita Tribe and its affiliated bands of Indians will have no legal recourse for asserting their claim against the United States for the wrongful taking of their aboriginal title lands and their treaty title lands in Western Oklahoma and Northwestern Texas without the extinguishment of their title to said lands. Your Petitioners, when the statement is made concerning their treaty title lands, realize that the opinion of the Court of Claims rendered on June 20, 1973, reversed the Order of the Indian Claims Commission relative to a summary judgment giving the Kiowa, Comanche and Apache Tribes and the Wichita Tribe treaty title to approximately 39 million acres of land in Oklahoma and Texas, but your Petitioners herein, that is the Wichita Tribe, is not petitioning for a Writ of Certiorari for that portion of the decision rendered by the Court of Claims, but there is the possibility that the Kiowa, Comanche and Apache Tribes may file a Petition in this Court for a Writ of Certiorari relative to the decision of the Court of Claims reversing the judgment of the Indian Claims Commission relative to the treaty title for approximately 39 million acres of land for the benefit of the Kiowa, Comanche and Apache Tribes and the Wichita Tribe.

REASONS FOR ALLOWANCE OF THE WRIT

This Petition for Certiorari has one principal issue which issue is whether it is correct or in error for the permitting of the Wichita Indian Tribe of Oklahoma to intervene in a pending timely filed claim approximately nineteen years after the normal running of the Statutes of Limitations for filing claims against the United States pursuant to the provisions of the Indian Claims Commission Act. Therefore, it is germane herein to review the legal proceeding of intervention before the Indian Claims Commission as promulgated in decisions and orders of the Indian Claims Commission and in decisions and orders of the Court of Claims, the appellate Court for the Indian Claims Commission.

The Indian Claims Commission Act provides that the Indian Claims Commission can establish its own rules of procedure but the Indian Claims Commission has never made any rule of any kind or nature relative to intervention in claims filed under jurisdiction of the Indian Claims Commission Act. An early decision concerning intervention under the Indian Claims Commission Act was styled, C. W. McGhee, et al., v. The Creek Nation and the United States, which decision was rendered on May 6, 1952, by the Court of Claims, 122 Ct. Cl., 380. The United States and the Creek Nation resisted intervention by C. W. McGhee, et al., as members of the Creek Nation East, which group was attempting to intervene in Docket 21, and the Indian Claims Commission denied intervention. On appeal to the Court of Claims by C. W. McGhee, et al., the Court of Claims reversed the Indian Claims Commission and stated that it was within the power of the

Indian Claims Commission to allow intervention and under the circumstances in said case intervention should have been allowed and the Order of the Court of Claims denying intervention was reversed. In reaching these conclusions, the Court of Claims said as follows in said decision reversing the Indian Claims Commission, 122 Ct. Cls. 380 at 395:

> "The legislative history of the Indian Claims Commission Act and the language of the Act itself indicate that it was the intention of Congress to provide for the complete and expeditious settlement of all just and equitable Indian claims, and denial of intervention to the representatives of the descendants of a group constituting a portion of the Creek Nation as it existed in 1814, in a suit involving an injury to that Nation, would defeat such purpose."

Your Petitioners persume this Court will note that the Court of Claims officially determined the importance of the legislative history of the Indian Claims Commission Act.

Your Petitioners further state that another early case on intervention before the Indian Claims Commission was decided on April 3, 1956, styled, Joseph Chitto, et al. v. United States, 133 Ct. Cls. 643. In this case the Choctaw Nation filed a motion to intervene in litigation before the Indian Claims Commission by Chitto, et al., as representatives of the Choctaw Indians East of the Mississippi River against the

United States, which motion to intervene was denied by the Indian Claims Commission. On appeal to the Court of Claims, the Court of Claims again reversed the Indian Claims Commission and the Court of Claims held that the Choctaw Nation had a sufficient interest in the litigation and in the claims to entitle it to intervene. The litigation in question concerned the distribution of the proceeds of the judgment rendered in the Court of Claims, that is, what group of Indians or Tribes were entitled to receive the said proceeds in question.

Your Petitioners believe that further examination of the rules on intervention or the absence of rules on intervention should be consumated at this time. The Federal Rules of Civil Procedure on intervention have been heretofore set out in this Petition under Authorities Involved and the rules of the Court of Claims on intervention have also been set out in this Petition under Authorities Involved and as has been heretofore stated, there are no rules of procedure by the Indian Claims Commission relative to intervention, but nevertheless, the intervention procedure has become a very important procedure by various Tribes of Indians and persons representing various Tribes of Indians in the past and your Petitioners believe this Court will ascertain the importance of the establishment of definite guide lines for intervention in the Indian Claims Commission, which guide lines can be promulgated if this Court issues a Writ of Certiorari herein.

The Court of Claims as the appellate Court for the Indian Claims Commission and the Indian Claims Commission have always considered pleadings and procedure before the Indian Claims Commission and generally follow the Federal Rules of Civil Procedure as same have been promulgated and if there are no express rules by the Indian Claims Commission, your Petitioners believe it is correct to state that the Federal Rules of Civil Procedure on intervention should govern any decisions made relative to the intervention procedure and reliance on the Federal Rules of Civil Procedure for matters presented before the Indian Claims Commission was promulgated by the Court of Claims in an early decision, Osage Nation of Indians v. U.S., 119 Ct. Cl. 592, 97 F. Supp. 381, certiorari denied 72 S. Ct. 230, 342 U.S. 896, 96 L.Ed. 672.

In this case the Court of Claims stated that the rule making power of the Indian Claims Commission was not so broad as to allow the Commission to refuse to consider a matter properly presented to the Commission by pleadings upon a technicality of common law pleading and the Court of Claims stated that technicalities of common law pleading has long since been disregarded by the United States Courts citing 28 U.S.C. Federal Rule of Civil Procedure, Rule 8 (e). The said rule in question states that pleadings must be concise and direct, but nevertheless the party may set forth two or more statements of a claim or defense alternately or hypothetically, and when two or more statements are made

in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

When the Indian Claims Commission granted its motion allowing the Wichita Tirbe to intervene in Docket 257, the order stated that it was granting the motion allowing the Wichita Tribe to intervene pursuant to the ruling of the Commission in Lipan Apache v. United States, 22 Ind. Cl. Comm. 1 (1969) and this Order granting motion to intervene is set out as Appendix C in the Separate Appendix to this Petition. Consequently, when the Appendix was prepared the next Appendix shown was Appendix D which is the opinion referred to by the Indian Claims Commission styled Lipan Apache v. United States, 22 Ind. Cl. Comm. 1 and will be referred to as the Lipan Apache opinion.

The Lipan Apache opinion states that intervention for the Tigua Indian Community was permissive and supported by two cases as cited by the Court of Claims, namely, Blackfeet and Gros Ventre Tribes, et al v. United States, 162 Ct. Cl. 136 (1963) and Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570 (1967). Your Petitioners believe that this Court will due to the importance of the Lipan Apache opinion of the Indian Claims Commission examine the decision in detail.

Your Petitioners further state that the end result of the Order allowing your Petitioners to intervene in Docket 257 before the Indian Claims Commission and the opinion of the Indian Claims Commission allowing the Tigua Indian Community to

intervene in Docket 22-C before the Indian Claims Commission depends upon the interpretation and the meaning and the authority of the two cases before the Court of Claims cited as authority, namely, Blackfeet and Gros Ventre Tribes, et al. v. United States, 162 Ct. Cl. 136 (1963) and Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570 (1967).

The Blackfeet and Gros Ventre Tribes case held that the Assiniboine Tribe as intervenors, although originally represented by the same law firm that represented the Blackfeet and Gros Ventre Tribes could on August 15, 1957 employ a successor law firm and file a motion to intervene, which motion to intervene was some six years after the normal running of the Statutes of Limitations and the Court of Claims held that intervention should be allowed and so ordered reversing the Indian Claims Commission. The Court of Claims held that the Assiniboine Tribe of Indians were not asserting a new or separate claim which would be untimely under Section 12 of the Indian Claims Commission Act which states that claims must be filed within five years from August 13, 1946. The reasoning of the Court of Claims in this decision was that the intervention was not untimely because it was not a new or separate claim and therefore intervention relates back to the time of the filing of the original claim.

The Court of Claims further stated that the Assiniboine Tribe was not responsible for the delay in filing their motion for intervention and the Assiniboine Tribe

was entitled to a hearing on its claim on its merits.

Your Petitioners further state that the principle difference between the Blackfeet and Gros Ventre Tribes and this case for which your Petitioners are requesting this Court for a Writ of Certiorari pertains to the employment of legal counsel and as to whether or not the claims were mutual or adverse. The principles of both cases are the same, but in both the Blackfeet and in this case the Indians did not have legal representation at the time of the running of the normal Statutes of Limitations for filing claims, that is, by the Attorneys for each Tribe that eventually filed motions to intervene. The Assiniboine Tribe presumed it had Attorneys representing them when the normal period of limitations expired, but some six years later the Tribe was left without legal counsel due to the resignation of the Attorneys that were representing the Assiniboine Tribe and then the Assiniboine Tribe employed new legal counsel and filed a motion for intervention in the case where the Blackfeet and Gros Ventre Tribes were the original claimants some seven years after the running of the normal Statutes of Limitations.

The Wichita Tribe did not have legal counsel as the time was expiring for the filing of claims in the Indian Claims Commission before the running of the normal Statutes of Limitations and the said Wichita Tribe made a desperate effort to obtain legal counsel before the expiration of the time for filing claims. The effort of the Wichita Tribe

is well documented in the Separate Appendix to this Petition for Certiorari in Appendix G pages 52 g through 64 g. The Wichita Tribe was without legal counsel until a short time before the filing of its motion to intervene in Docket 257 before the Indian Claims Commission, therefore, neither the Assiniboine Tribe nor the Wichita Tribe could be charged with latches in the filing of their claims.

The basic claim of the Assiniboine to some extent entwined with the Blackfeet and Gros Ventre Tribes due to the fact that both Tribes had participated in agreements with the United States which were ratified in 1888 and the basic claim of the Assiniboine Tribe and the Blackfeet and Gros Ventre Tribes pertain to unconscionable consideration for the ceding of their lands in 1886 to the United States where both Tribes were then located.

The Wichita Tribe in its Complaint in Intervention alleged that the said Tribe had a valid aboriginal title to the same portion and same area of land that the Kiowa, Comanche and Apache Tribes were claiming aboriginal title to when they filed their original claim in Docket 257 before the Indian Claims Commission. The Wichita Tribe does not claim that it has a joint interest with the Kiowa, Comanche and Apache Tribes, but the Wichita Tribe claims that it is the rightful aboriginal owner to the same area that the Kiowa, Comanche and Apache Tribes are claiming to be aboriginal owners of. The principle of the claim of the Wichita Tribe is the same as the

principle of the Assiniboine Tribe in the Blackfeet case, which principle is that the said intervenors were entitled to the benefits from the pending claims in question. The Court of Claims stated in the Blackfeet and Gros Ventre case that the Assiniboine Tribe should not be held responsible for a delay in filing its claim if the delay was not the fault of the Assiniboine Tribe and it was the broad remedial intent of the Indian Claims Commission Act for each Tribe to have a hearing on the merits of its claim. The principle applies to the intervention of the Wichita Tribe in Docket 257 and the Court of Claims in its decision for which this Petition for Certiorari is requested, which decision was rendered on June 20, 1973, Appendix A at pages 21 a and 22 a in the Separate Appendix states as follows:

> "The result we would reach if we adopted the intervenors reasoning would be to allow a party, too late to file his own claim, to obtain a hearing by appending his claim to that of another party, timely filed, whose claim he seeks to defeat. It is not a question of one or the other party getting an award admittedly due someone. The proofs adduced on behalf of the Wichitas could easily demonostrate that no one had exclusive control of the tract to which the Kiowas and their group claim aboriginal title, or of parts thereof. The Wichita Indian Tribe of Oklahoma and Affiliated Bands could have timely filed their claim with the Indian Claims Commission. They did not. It would work an injustice to allow

them to join in a timely filed suit by the Appellees when the result of that intervention may be the defeat of the Appellees claim, and of any claim."

Your Petitioners believe that the reasoning of the Court of Claims in its decision of June 20, 1973, is in direct conflict with the general principles announced in Blackfeet and Gros Ventre Tribe because of the stating by the Court of Claims that it would be an injustice to the group that originally filed the claim to allow the Wichita Tribe to intervene. The reasoning of the Court of Claims in its decision of June 20, 1973, is that in Blackfeet and Gros Ventre Tribe and other decisions cited at the top of page 21 a in the Separate Appendix A were cases where the intervenors were not claiming adversely to the claimants who had timely filed their claims. The Wichita Tribe believes that this is not the correct criteria for allowing or disallowing intervention, that is, the requirement that intervention may not be permitted if the interventors are claiming adversely to the timely filed claimants. Your Petitioners believe that this Court will agree that the guide lines on intervention before the Indian Claims Commission should be the rules of Civil Procedure on intervention as promulgated by this Court, which rules have been heretofore set out in this Petition under Authorities Involved.

Your Petitioners further state that a casual reading of the Federal rules on intervention show that the intervention must be timely but there is no requirement in the rules that late filing of an adverse claim would work an injustice against those having a timely filed claim which was the premise set out in the decision of the Court of Claims promulgated on June 20, 1973, for which this Petition is requested, see separate Appendix A at page 22 a.

Your Petitioners wish to examine in detail the other important decision of the Snoqualmie Tribe of Indians v. United States, 178 Ct. Cls. 570, 372 F.2d 951 (1967) as one of the authorities stated by the Indian Claims Commission for allowing intervention of the Tigua Indians in Docket 22-C and the Wichita Tribe in Docket 257. The Snoqualmie case was not directly on intervention, but it did pertain to the overall principle of pleading and practice, amendment to pleadings, and relation back of amendments. This case again also definitely establishes the overall principle of practice and pleading and procedure if there is no rule of the Indian Claims Commission, then the rules of the Court of Claims and the Federal Rules of Civil Procedure are followed. In the Snoqualmie Tribe an amendment to the original Petition was allowed several years after the running of the Statutes of Limitations and the Court of Claims said that although the amendment appeared to introduce a new party and a new cause of action each case must be tested by the conduct, transaction,

or occurrence standard to determine whether adequate notice was given to the United States for the particular claim in question and the Snoqualmie case further stated that the United States could be charged with the notice of the possibility of new or amended claims. Your Petitioners believe that the general principle set out in the Snoqualmie Tribe decision was not followed and was overruled in the decision of the Court of Claims issued on June 20, 1973, for which this Petition for Certiorari is requested.

Your Petitioners further state that this Petition for Certiorari is very important to your Petitioners because the Petitioners believe that they can definitely prove that they were the Indians that had aboriginal title to practically all of Oklahoma and a considerable portion of the Northern part of Texas and that these lands were taken away from the said Tribe without extinguishment of their Indian title and that although the Wichita Tribe has been before the Court of Claims twice, they have never been allowed or permitted to have a hearing on the wrongful taking of their aboriginal lands and due to the circumstances as set out in their Complaint in Intervention (See Appendix G in Separate Appendix hereto), they were unable to secure knowledgeable legal counsel to represent them to file their claim during the normal running of the Statutes of Limitations pursuant to the Indian Claims Commission Act. After legal counsel was obtained, the Wichita

Tribe was allowed to intervene in Docket 257 before the Indian Claims Commission for which this Petition for Certiorari is concerned and the Wichita Indian Tribe of Oklahoma has also intervened in Docket 226 before the Indian Claims Commission in which case the Caddo Tribe of Oklahoma was the original claimant and there has already been a trial on the merits in Docket 226 and Briefs have also been filed in Docket 226 and the Indian Claims Commission will issue its decision at a later time, perhaps after this Petition for Certiorari has been acted upon.

Your Petitioners further state that in Docket 226, the Indian Claims Commission allowed the Alabama-Coushatta Indians of Texas and the Coushatta Indians of Louisiana, and the Tonkawa Tribe of Oklahoma, et al., to intervene and the order permitting all of these Tribes, including the Wichita Tribe was issued many years after the running of the Statute of Limitations for filing claims against the United States. Your Petitioners also state that in Docket 22-C the Tiguas were allowed to intervene many years after the normal running of the Statutes of Limitations, and your Petitioners further state that a decision on intervention where various Tribes have what appears to be a just and bona fide claim for portions of aboriginal lands and treaty title lands for which other Tribes have timely filed claims and the Indian Claims Commission has allowed intervention after the normal running of the Statute of Limitations will eventually stand or be disallowed depending upon the

allowance or disallowance of this Petition for Certiorari and the Petitioners herein are petitioning for relief for themselves and if they are given relief, many other Indian Tribes will doubtless be allowed to proceed on the merits of their claims.

The Indian Claims Commission Act was originally passed on August 13, 1946, and in the original Act, the Indian Tribes, pursuant to Section 12 of said Act, had five years to present their claims which time, of course, expired on August 13, 1951, and in the same original Act the Indian Claims Commission had ten years to complete its hearings on the claims that would be filed within five years. The Indian Claims Commission Act has been amended four times extending the time for determining claims and at the present time the Indian Claims Commission Act will expire in 1977. Restating these facts, the Indian Claims Commission Act has been extended by legislation 21 years past the original time for the determination of claims by the Commission, but there has never been an extension of any time past the original five years for filing claims by Indian Tribes or Indian groups and your Petitioners believe that the Indian Claims Commission, perhaps, has become cognizant of several claims that normally could not be filed due to the limitations, but the Indian Claims Commission has determined that if the said claimants are claiming the same area that has been timely claimed by another Tribe, intervention should be granted in many instances. As has been heretofore stated, intervention has been granted in

many cases and your Petitioners believe that the Indian Claims Commission has undoubtedly only allowed intervention where they were of the opinion that the intervening claimants apparently have just claims because the Indian Claims Commission has also denied intervention in several instances.

Your Petitioners believe that perhaps the Indian Claims Commission had in mind such cases as this Court has decided and in particular U.S. v. State of La., 1957, 77 S. Ct. 1373, 354 U.S. 515, 1 L. Ed. 2d 1525. In this case the United States brought suit against the State of Louisiana for determination of certain rights in the Gulf of Mexico and this Court Sua Sponte decided that other States adjoining on the Gulf of Mexico, such as Texas, Alabama, and Florida, should have sixty days to file or intervene in said case and this Court gave as its authority for such ruling its own Rule 9 (2) (6) and Rule 21[1] of the

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1 RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Federal Rules of Civil Procedure and general authorative power and equity to order additional parties to file their claims or petitions in said action and the Indian Claims Commission, apparently, was of the opinion that its general power and equity gave it the right to allow the necessary parties to be brought into Docket No. 257 which, of course, included the Wichita Indian Tribe of Oklahoma and especially after the United States of America had filed its Answer in Docket 257 which Answer was filed March 1, 1955, and Paragraph 4 of the First Defense, Paragraph 9 of the Second Defense, and Paragraph 15 of the Second Defense are as follows:

"4. That the issues set forth in the petition have heretofore been judicially determined and the matters are res judicata by reason of former decisions of the Court of Claims and of the Indian Claims Commission including Wichita Indians, et al., v. United States, 89 C. Cls. 378; and Choctaw and Chickasaw Nations v. United States and the Wichita, et al., Bands, 179 U.S. 494, reversing 34 C. Cls. 17."

"9. Defendant admits paragraph 4 of the petition. As an affirmative defense, defendant alleges that at least 3,500,000 acres of the land claimed by petitioners in this suit are claimed by the Osage Tribe in the case of Osage Tribe v. United States, No. 107, in the Indian Commission, and that at least an additional 5,500,000 acres of the

land claimed by petitioners in this suit were claimed by the Quapaw Tribe in the case of Quapaw Tribe v. United States, No. 14, in the Indian Claims Commission, decided March 15, 1951, Vol. 1, p. 469, affirmed April 6, 1954, 128 Ct. Cls. 45."

"15. (a) Defendant denies paragraph 10 of the petition and specifically denies that the Kiowa, Comanche or Apache Indians occupied the area described in paragraph 9 or that those tribes were ever recognized as being the owners or the users of those lands. Defendant denies that the petitioners were the users and owners of those lands prior to 1835 and affirmatively alleges that those lands were at that time largely under the sovereignty of another nation and not of the United States. Defendant alleges the fact to be that at no time did the United States recognize petitioners' occupation of the lands described as being Tracts 478, 511, and 510 in paragraph 9 of the petition and at no time was there an understanding by the United States that this land was the home of petitioners. Defendant also denies that a claim based upon occupation of this land is subject to the jurisdiction of this Commission and affirmatively alleges that it was decided in the case of Wichita, et al., v. United States, 89 C. Cls. 378, and in the Cherokee case, decided December 28, 1953, by this Commission, that if the Indians who occupied land in Texas, prior to the time that Texas became a state of the United States, had any

claims for damages or compensation, such claims were against the State of Texas and not against the United States, and that in the Act of Congress bringing the Republic of Texas into the United States there was no provision that the United States would assume the obligations, if any, of the Republic of Texas to the Indians occupying land in the Republic of Texas.

(b) Defendant also alleges that, in some of the treaties cited by petitioners in paragraph 10, other tribes than petitioners were well represented including the Caddo, Hainai, Wichita, Waccos, Anadarko, Lipan, Tonkawa, and others, which precludes the petitioners from establishing an aboriginal claim against the defendant. Also defendant denies that in the Treaty of 1835 (7 Stat. 474) and in the Treaty of 1846 (9 Stat. 844), the United States recognized the petitioners' continuous use and occupancy of any of the land described in paragraph 9 of the petition."

Your Petitioners further state that although they realize that technically the statements that will be made in this paragraph are not grounds for the granting the Writ of Certiorari, your Petitioners believe that the statements should be given some credence by this Court and the statements are that the Bureau of Indian Affairs has approved a loan from the United States in the amount of $52,000.00 to be used in proving the claims of the Wichita Tribe in Docket

257 and Docket 226 and approximately $10,000.00 has been spent in Docket 257 and Docket 226 and therefore it is apparent to your Petitioners that the Bureau of Indian Affairs had considerable faith in the validity of the claims of the Wichita Tribe against the United States for the wrongful taking of its lands.

Your Petitioners further realize that timeliness of intervention could take up the entire space allowed for a Petition for Certiorari, but the argument and basic law on timeliness is well summarized in a recent case decided on November 13, 1972, Hodgson v. United Mine Workers of America, 473 F. 2d 118 (1972) and in particular at pages 127 through 130 inclusive and in this case intervention was allowed after the Statute of Limitations had run.

CONCLUSION

Therefore, sumarizing, your Petitioners state that a Writ of Certiorari should be issued to the United States Court of Claims for one or more of the following reasons:

1. The Court of Claims has overruled its own decisions in principle by its decision for which this Writ of Certiorari is requested and in particularly the decision of Blackfeet AND Gros Ventre Tribes, et al. v. United States, 162 Ct. Cl. 136 (1963).

2. There are many Indian Tribes that have pending claims based on intervention

after the normal running of the Statute of Limitation which claims will doubtless be adjudged valid or invalid after this Petition for Certiorari has been denied or allowed, and if allowed when a final decision of this Court has been rendered on intervention and the issuance of a Writ of Certiorari herein would result in the promulgating of definite rules and guide lines for intervention before the Indian Claims Commission after the running of the normal period of the Statutes of Limitations.

3. The Wichita Tribe has for the third time requested legal relief and as Stanley A. Cain, the Assistant Secretary of the Interior, stated in his letter to Wayne N. Aspinall on February 28, 1967, as said letter is set out in full in Separate Appendix H:

> "The tribes are entitled to their day in court, and if they are not allowed to proceed before the Indian Claims Commission they will undoubtedly request the enactment of special jurisdictional acts, which is a practice Congress sought to avoid when it enacted the Indian Claims Commission Act."

and if denied the third time the Wichita Tribe will doubtless be seeking legislation for relief, which procedure is contra to the legislative history of the Indian Claims Commission Act, which legislative history showed it was the intent of Congress for all

Indian Tribes to have their day in Court.

4. The Indian Claims Commission had the overall general authority to allow the Wichita Indian Tribe to intervene in Docket 257 Sua Sponte under the same authority that this Court used in U.S. v. State of La., 77 S. Ct. 1373, 354 U.S. 515, 1 L. Ed. 2d 1525 (1957).

5. A Writ of Certiorari should be issued to the Court of Claims because the Court of Claims did not realize that the right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard.

6. The Complaint in Intervention was timely filed pursuant to the guide lines and decisions of the Federal Courts interpreting timeliness under Rule 24 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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December, 1973

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FILED
DEC 24
MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES,

Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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HINTON, OKLAHOMA
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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 12-71

24 Ind. Cl. Comm. 405 (1971)
26 Ind. Cl. Comm. 101 (1971)

(Decided June 20, 1973)

THE UNITED STATES OF AMERICA v. THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND AFFILIATED BANDS, ET AL., INTERVENORS

Bernard M. Sisson, with whom was Assistant Attorney General Kent Frizzell, for appellant.

J. Roy Thompson, Jr., attorney of record for The Kiowa, Comanche and Apache Tribes of Indians, appellees.

Omer Luellen, attorney of record for The Wichita Indian Tribe of Oklahoma, etc., intervenor. Paul M. Niebell, of counsel.

Before COWEN, Chief Judge, DURFEE, Senior Judge, DAVIS, SKELTON, NICHOLS, KUNZIG, and BENNETT, Judges.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, Judge, delivered the opinion of the court:

This case is before the court on appeal from the Indian Claims Commission (Commission) decision in its Docket No. 257. The Appellees', Kiowa, Comanche and Apache Tribes filed a claim with the Commission in 1951 in which they claimed aboriginal title to areas of Texas, Oklahoma, New Mexico, Colorado and Kansas, and recognized title to the lands set out as Tracts 511 and 510 on Plate CLXIV, Texas and Portions of Adjoining States, Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897 (Royce Areas 510 and 511). This appeal involves only the claim of title to Areas 510 and 511 as allegedly recognized in the Treaty with the Comanche and Kiowa Tribes, concluded on October 18, 1865.

The Appellee Tribes filed a motion for summary judgment on the issue of recognized title on February 13, 1970. Before the Commission ruled, The Wichita Indian Tribe of Oklahoma and Affiliated Bands filed a motion for leave to intervene, originally claiming aboriginal title to the land in question and subsequently claiming recognized title under the Treaty of 1865. The Commission granted the motion for leave to intervene. Both Appellees-Kiowa, Comanche and Apache Tribes-and Appellant, United States, seek reversal of this Commission decision.

It granted the motion for summary judgment and the United States appeals. We reverse on both issues.

We will first deal with the issue of the claimed recognized title of the Kiowa, Comanche and Apache Tribes and then will turn to the issues raised on the question of intervention by The Wichita Indian Tribe of Oklahoma and Affiliated Bands (intervenors).

The Appellees' claim of recognized title rests on the language of the Treaty of October 18, 1865, 14 Stat. 717, 718. Article II thereof reads:

> ARTICLE II. The United States hereby agree that the district[1] of country embraced within the following limits, or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose, viz: commencing at the northeast corner of New Mexico, thence south to the southeast corner of the same; thence northeastwardly to a point on main Red river opposite the mouth of the North Fork of said river; thence down said river to the 98th degree of west longitude, thence due north on said meridian to the Cimarone river; thence up said river to a point where the same crosses the southern boundary of the State of Kansas; thence along said southern boundary of Kansas to the southwest corner of said State; thence west to the place of beginning, shall

be and is hereby set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty, and of such other friendly tribes as have heretofore resided within said limits, or as they may from time to time agree to admit among them, and that no white person[2] except officers, agents, and employes of the government shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages. The Indians[3] parties hereto on their part expressly agree to remove to and accept as their permanent home the country embraced within said limits, whenever directed so to do by the President of the United States, in accordance with the provisions of this treaty, and that they will not go from said country for hunting or other purposes without the consent in writing of their agent or other authorized person, specifying the purpose for which such leave is granted, and such written consent in all cases shall be borne with them upon their excursions, as evidence that they are rightfully away from their reservation, and shall be respected by all officers, employes, and citizens of the United States, as their sufficient safeguard and protection against injury or damage in person or property, by any and all persons whomsoever. It is

further agreed by the Indians parties hereto that when absent from their reservation, they will refrain[4] from the commission of any depredations or injuries to the person or property of all persons sustaining friendly relations with the government of the United States: that they will not while so absent encamp[5], by day or night, within ten miles of any of the main travelled routes or roads through the country to which they go, or of the military posts, towns or villages therein, without the consent of the commanders of such military posts, or of the civil authorities of such towns or villages, and that henceforth they will and do hereby relinquish all claims[6] or rights in and to any portion of the United States or territories, except such as is embraced within the limits aforesaid, and more especially their claims and rights in and to the country north of the Cimarone river and west of the eastern boundary of New Mexico.

[1]Reservation for Indians who are parties hereto.
[2]Boundaries. No whites, except, &c. to settle thereon, unless, &c.
[3]Indians to remove thereto, and not leave, unless, &c.;
[4]to refrain from depredations;
[5]not to encamp within ten miles of, &c.
[6]Claims to other lands relinquished.

The land described in the above article constituted Royce Areas 510 and 511. The origin of the controversy in this case is the phrase "the district of country embraced within the following limits, or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose * * *". The question of whether the 1865 Treaty recognized title in the Appellees gains particular import because in 1867 by another Treaty, 15 Stat. 581, the United States established a reservation for the Appellees which was comprised of only Royce Area 510, some 3,000,000 acres. Thus if title to both Royce Areas 510 and 511 was recognized in the 1865 Treaty the Appellees would have a claim to be compensated for the loss of Royce Area 511.

The Commission, in an opinion signed by four commissioners, held that the Treaty recognized title to both Areas, but there was a dissent by Chairman Kuykendall.

Appellant tells us that the Senate never intended to and did not ratify the recognition of title to Royce Areas 510 and 511 in the 1865 Treaty. We are told that a large portion of the Area in question was within the boundaries of the State of Texas, and that other Tribes had claimed portions of the Area. Texas retained its public lands upon entering the Union. Therefore, the Appellant points out that the United States could not grant title to a good portion of the land in question and it would be contrary to the presumption of good faith on the part of public officials

to assume that such a grant was intended. The Appellant invites the court to inspect the language of the Treaty and asserts that in order for there to be a recognition of title there must be language of permanent use and occupation. Appellant would have the court interpret the language of the Treaty to be a temporary recognition of the right to occupancy subject to divestment at the order of the President. Events surrounding the signing of the 1865 and 1867 Treaties are seen by the Appellant as support for its interpretation of the Treaties, especially the alleged fact that the Indian signatories did not make specific protestations prior to the 1867 Treaty that the land vested in them in 1865 was being divested. Finally, the defendant views the Treaty of 1867 as the Presidential action called for in the 1865 Treaty.

Appellees point out that in the Treaty of 1865 the Indian Tribes ceded their claims to some 100,000,000 acres of land. In return the United States set aside the 39,680,000 acres described in Article II of that Treaty. The Appellees contend that the allegation by Appellant that the United States did not have title to the Area in question is of no import in the issue of the Indians' right to be compensated for land the United States purported to grant. The Appellees view the language of the 1865 Treaty as recognizing permanent title in the Areas of Royce Area 510 and 511 and point out that the language of recognition in the 1865 Treaty is substantially similar to the language of the 1867 Treaty, which in prior litigation has

been deemed to have recognized title to Royce Areas 510 in these tribes. See, United States v. Kiowa, Comanche and Apache Tribes of Indians, 143 Ct. Cl. 534, 163 F. Supp. 603, aff'd on rehearing, 143 Ct. Cl. 545, 166 F. Supp. 939 (1958), cert. denied, 359 U.S. 934 (1959).

Appellees also say that Appellant misreads the events surrounding the 1865 and 1867 Treaties, and views them as supporting their position. Appellees point out that failure to protest a Treaty has been held not to deprive Tribes of the rights lost by that Treaty, and note that even a passing reference to the statements made by the Chiefs present at the Treaty negotiations would reveal their displeasure at the treatment they were receiving at the hands of the United States. The Appellees note that neither the events leading up to the 1867 Treaty nor the language of that Treaty indicate that it was to be an implementation of the Treaty of 1865. Conversely the Appellees argue that the language of the 1867 Treaty indicates a recognition of the permanent title vested by the 1865 Treaty. On this point the Appellees say that the 1865 Treaty called for Presidential action while the 1867 Treaty was entered into as the result of the activities of a Congressionally appointed commission. Finally, the Appellees contend that the acceptance of Appellant's interpretation of the 1865 Treaty would result in the Tribes having ceded to the United States 100,000,000 acres of land in exchange for nothing in

1865 and finally in exchange for some 3,000,000 acres of land in 1867. Such a holding we are told would be contrary to fair and honorable dealings and fly in the face of the fiduciary duty assumed by the United States towards the Indians.

In reaching our decision, we have found it unnecessary to consider all of these issues.

The intentions of the parties to an Indian Treaty need not be demonstrated by formal language. Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959). Therefore a court must take special care in interpreting such a Treaty so as to be able to understand what was intended. When a court endeavors to interpret a Treaty between the United States and an Indian Tribe it is bound by the unambiguous words of that Treaty and cannot rewrite them. United States v. Choctaw Nation, 179 U.S. 494 (1900); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945). Where the words of the Treaty leave room for more than one interpretation the court is to interpret the Treaty in a manner not prejudicial to the Indians. Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1832). In interpreting the words of the Treaty, the proceedings leading up to the Treaty and the events which follow it should be examined if necessary in order to elucidate the intention of the recognizing party, the United States. Miami Tribe of Oklahoma, supra; Crow Tribe of Indians v. United States, 151 Ct. Cl. 281, 284 F. 2d 361, cert.

denied, 366 U.S. 924 (1960). Thus in order to reach a conclusion as to whether the 1865 Treaty recognized title to Royce Areas 510 and 511 one must first attempt to ascertain the intention of the parties from the language of the Treaty. As stated by Judge Madden in The Miami Tribe of Oklahoma, at 445:

> * * *By "recognition", the courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign. Those additional rights may be sufficient to spell out fee simple title in the Indians if that is what Congress wished, or they may result in something less than fee simple title. The extent of those new and additional rights and the accompanying obligations of the sovereign and the tribe will usually be determined by the Congressional enactment, the treaty, or the agreement, conferring them. * * *

The language of the 1865 Treaty indicates that the Areas granted were subject to redefinition and diminution at the will of the President. The Tribes were granted Royce Areas 510 and 511 "or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose." It is true that the Treaty spoke of the land granted as the Indians permanent

home; however, that does not detract from the fact that the extent of that grant was left to later determination. Therefore, without a demonstration of a contrary intention on the part of the United States the language of the 1865 Treaty would defeat the Appellees claim.

The Appellees point to a number of cases which hold that the language need not state formally that the United States intends to recognize title in order for recognition to be accomplished. In Miami Tribe of Oklahoma, for example, Judge Madden viewed the Tribe's right to occupy the land in question permanently or until they were disposed to sell it as tantamount to recognized title. In that case if the Indians chose to sell the land they could sell only to the United States, which Appellant urged diminished the nature of the title held. Judge Madden disposed of the Government's argument by noting at pgs. 439, 441, that:

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", "recognized title", and "acknowledged title" * * *
>
> * * * * *
>
> * * * an agreement to permit the Indians to occupy land permanently or until they

were disposed to sell it to the United States seemed to the Commission, as it does to us, to be a clear indication of an intention on the part of the United States to recognize in the Indian treaty parties more than aboriginal use and occupancy title to the land in question.

In the Miami Tribe of Oklahoma case the nature of the grant was the question before the court while, in the case at bar, the Treaty demands that the court also deal with the question of the extent of the grant. Thus the analogy to Miami Tribe of Oklahoma is of little aid to the Appellees because we cannot hold that the 1865 Treaty recognized permanent title in the Appellee Tribes without first answering the question: recognized title to what? We are faced with the language of the Treaty which allegedly, "recognized" title to Royce Areas 510 and 511 "or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose * * *".

The court is aware that formal statements of recognition are not necessary in order that a Treaty be deemed to have recognized title in a particular Tribe. However, as stated in Tee-Hit-Ton v. United States, 348 U.S. 272 (1955), "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation."

The court is also aware of those cases under which either the events surrounding the Treaty or action subsequent to the Treaty were deemed to have demonstrated the

intention on the part of the United States to recognize title, notwithstanding the language of the Treaty.

The case closest to the one at bar in which Treaty language was seen as overturned by subsequent action is Klamath & Moadoc Tribes v. United States, 85 Ct.Cl. 451 (1937), aff'd., 304 U.S. 119 (1938). In that case the Tribe had entered into a Treaty in 1864 which permitted them to occupy certain territory "until otherwise directed by the President * * *". Shortly thereafter a portion of the territory granted to the Tribe was mistakenly granted to the State of Oregon which in turn sold the land. The Attorney General of the United States sued to recover the land for the Tribe but was unsuccessful. Whereupon the United States arranged for the exchange of the original tract for a smaller one from the reservation and the payment to the Tribe of $108,750 for the second tract. The purchaser of the second tract sold the lumber thereon for $3,700,000. The Tribe brought suit under a special act for increased compensation for the land taken including the value of the lumber. The United States defended in part by contending that in the 1864 Treaty the President had retained the power to divest the Tribe of portions of the reservation. The court noted that over the 44 year period in which the events above described transpired the Government had acted in a manner only consistent with its recognition of title to the land in the Tribe. Contrary to the President acting to repossess the land, his inaction and

Congressional action to pay for the land taken from the Tribe clearly indicated a recognition of title in the Tribe.

The real point about this Klamath case is that the limitation language there involved: "until otherwise directed by the President" did not expressly relate to the territorial extent of the grant, as the corresponding language does here. This court did not speculate, nor did it need to, as to what direction "otherwise" the President might have given. Apparently, by other Treaty provisions, he might have moved other Tribes on the same reservation, or perhaps, he might have put the Klamaths on some other reservation. In either event, suppose they thought of the grant as conveying specific property, there was nothing to suggest in the limitation language that they might be deprived of that property, or part thereof, without compensation. It was expressly spelled out that the location of other Tribes on the reservation would not forfeit any rights guaranteed to the Treaty parties. It was reasonable for this court to conclude, after non-exercise of the Presidential power over 40 years, that it had lapsed, and was no longer a factor in determining the extent of the Klamaths' property interest. The Government, too, had repeatedly since recognized the Klamaths as owners.

Here, on the other hand, the very language of the grant put the grantees on specific notice that the territorial extent of the grant was uncertain and yet to be determined. Instead of embracing a wide range of possibilities, the Presidential

action was to focus on one thing only, the territorial extent. It does not seem that any reasonable grantee could have supposed he was getting a permanent grant of the entire tract. It is not suggested the Kiowas were so ignorant they actually misunderstood what they were getting, or could have done so. A long lapse of time might have allowed title to firm up to all the two Royce Areas, but no such lapse was allowed to occur. There was nothing to suggest that the President, if he acted, would deprive the Kiowas of anything, rather, he would for the first time define what it was they had, which until then they did not know. The Commission relied mistakenly on this Klamath case.

Appellees can point to no action on the part of the President or Congress consistent with the recognition of title. The subsequent Treaty of 1867 unequivocally recognized title to only Royce Area 510. Appellees point to language in Article XI of the 1867 Treaty where reference is made to "the old reservation as defined (in the Treaty of 1865)." Such language simply supports the allegation that some Area was reserved to the Tribes in 1865 but does not dispose of the question of what Area was reserved in view of the phrase permitting the President to set the bounds of the reservation at a later date. Appellees also point to Article XVI of the 1867 Treaty where the Tribes retained the right to hunt on the "lands formerly called theirs". However, in view of the fact that a similar provision was found in the 1865 Treaty it

appears likely that this reference is to lands which the Tribes claimed by aboriginal title and not those allegedly recognized in the 1865 Treaty. The Appellees invite the court's attention to the fact that the recognition of Area 510 in the 1867 Treaty which has been upheld by this court, Kiowa, Comanche & Apache Tribes, supra, was accomplished by substantially similar language as that used in the 1865 Treaty. We think it significant that absent from the language of the 1867 Treaty was the phrase which reserved the power in the President to set the bounds of the Area granted at a later date, the very phrase here to be construed.

The negotiations leading to the Treaty of 1865 indicate that while it was intended that an Area be set aside for the Appellees, no agreement was reached as to the boundaries of that Area. In fact the Area described in the proceedings prior to the Treaty is comprised of about half of Area 510 and three-fourths of Area 511 and thus differs from that which was designated in either the 1865 Treaty or the 1867 Treaty. After the negotiation and before the ratification of the Treaty of 1865 the Commissioner of Indian Affairs, D. N. Cooley, writing to the Secretary of Interior stated in part:

* * * * *

*** As to the treaty with the Kiowas and Comanches. It will be observed, in regard to this treaty, that it does not undertake to limit the Indians to any small reservation, but includes a very large district of country, comprising about 62,000

> square miles, which they are to be allowed to have 'absolute and undisturbed use and occupation,' ie: the tribes treated with and 'such as they may agree to admit among them.' This vast region, thus set apart, may be limited at the discretion of the President. (Emphasis supplied.)

* * * * * *

It thus appears from this contemporaneous interpretation that the United States did not intend to and did not recognize permanent title to the land in question in the 1865 Treaty.

In attempting to interpret the 1865 Treaty this court is faced with a Treaty which by its words does not recognize permanent possession of the lands in question. The words reveal an intent to grant something less than recognized title in the entire Area described. This apparent intent was not contradicted by the proceedings prior to the Treaty nor by interpretations of the Treaty following its signing but prior to its ratification. No action was taken by the United States inconsistent with the apparent intent of the Treaty.

Appellees contend that if this court should hold that the Treaty of 1865 did not recognize title in the Tribes we would be affirming a breach of fair and honorable dealings. This contention is based on the Appellees having had aboriginal title to 100,000,000 acres of

land and losing all but 3,000,000 of that land by 1867 without any consideration being given for such loss. If, in fact, Appellees can prove in subsequent proceedings that they had aboriginal title to so much land, this very opinion will support their claim based on unconscionable consideration. However, at this juncture we are not being asked to rule on the question of aboriginal title.

Finally, we are told that the phrase in question called for Presidential action and that the 1867 Treaty was not that action. It was negotiated by commissioners, pursuant to Congressional directive. Appellees seem to glean some significance from the fact that the Treaty of 1867 constituted action of the President with the advice and consent of the Senate, in a manner directed by Congress, instead of individual Presidential action without further Congressional participation. We do not find the distinction persuasive. Nothing in the 1865 Treaty directed the form of action the President was to take.

The parties have devoted a great deal of interesting research to whether the 1867 Treaty constituted action by the Congress or by the President. The contending views may be found ably stated in the prevailing and dissenting opinions below. Actually, we think this is irrelevant. If, as we hold, the 1865 Treaty was not intended to grant recognized title to the entire tract, but to leave its territorial extent for later determination, the summary judgment was erroneously granted and the claim based on the 1865 Treaty must

fail, whether or not the 1867 Treaty was intended as an exercise of the President's 1865 Treaty power. Our holding is that no recognition of title to any specifically bounded tract occurred in 1865, and the first such was in 1867.

It does not follow that the Indians had nothing under the 1865 Treaty. They had a moral and equitable claim that the President's power to delimit boundaries be exercised in a manner fair and just to them, in light of their needs and in light of what they had given up; also in light of the lawful claims of Texas and of other Tribes. Thus in Citizen Band of Potawatomi Indians v. United States, 179 Ct. Cl. 473, 488, 391 F. 2d 614, 622 (1967), cert. denied, 389 U.S. 1046, 390 U.S. 957 (1968), we said, referring to a right reserved in the President to select 144,000 acres out of a tract granted those Indians:

> A fair interpretation of the treaty is that the President would select the 144,000 acres in his capacity as "Great White Father" of the Indians as well as head of the United States Government. A callous disregard of the interests of either would be an abuse of discretion. * * *

A grant of Blackacre or such portion of Blackacre as the grantor might decide upon in his discretion would hardly be considered to convey a marketable title. It is only the peculiar mystique of Indian

law that allows a question here. If the grantor of Blackacre stood to the grantee in the relationship of parent, guardian, or trustee, the grantee would have something, but he still could hardly describe himself as the owner of all Blackacre.

Since the summary judgment on recognized title was erroneously granted, it must be reversed on defendant's appeal.

We now turn to the question of intervention by the Wichita Indian Tribe of Oklahoma and Affiliated Bands, As noted above the motion to intervene was filed with the Commission nearly twenty years after the Appellee Tribes filed their claim for relief. The original motion claimed aboriginal title to the area in question but was expanded to include a claim for compensation under the 1865 Treaty. The preceding portion of our opinion makes the attempted intervention in the claim for recognized title moot. Only the question of the right to intervene in the claim for aboriginal title remains of significance.

In its brief on the question of intervention the intervenors go to great length to demonstrate that in the case of amended pleadings the amendment relates back to the original pleading if no new cause of action is presented and adequate notice was provided to the parties. We will not attempt to explore this line of reasoning because it is clear to us, that this is not a case of amended pleadings. The Appellees are not amending their pleadings to include the intervenors but have vigorously opposed their intervention.

On the question of intervention the parties rely on the cases of Blackfeet & Gros Ventre Tribes v. United States, 162 Ct. Cl. 136 (1963), and Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 372 F.2d 951 (1967). (See, United States v. Northern Paiute Nation, 183 Ct. Cl. 321, 393 F. 2d 786 (1968), Lipan Apache Tribe v. United States, 22 Indian Claims Commission 1 (1969). These cases do not show that a late intervenor may intervene in a claim where his interests are in direct conflict with those of the original claimant. In both the Blackfeet and the Snoqualmie cases we took pains to show that no intervenor was claiming adversely to the timely claimant. In both cases the litigation involved Treaties to which the intervenors were joint parties. Nor do we see these intervenors as the real parties in interest in the Kiowa, etc., claim. One cannot contend that he is the real party in interest when his claim has been forfeited by his failure to timely file with the Commission.

The result we would reach if we adopted the intervenors reasoning would be to allow a party, too late to file his own claim, to obtain a hearing by appending his claim to that of another party, timely filed, whose claim he seeks to defeat. It is not a question of one or the other party getting an award admittedly due someone. The proofs adduced on behalf of the Wichitas could easily demonstrate that no one had exclusive control of the tract to which the Kiowas and their group

parts thereof.
claim aboriginal title, or of lahoma and
The Wichita Indian Tribe of Ok mely filed
Affiliated Bands could have ti aims Commission.
their claim with the Indian Cl n injustice
They did not. It would work ely filed
to allow them to join in a ti result of
suit by the Appellees when th efeat of the
that intervention may be the aim.
Appellees claim, and of any c.

Intervenor has moved to ha e the court
strike that portion of the Go ernment's
appeal which challenges its r ght of
intervention. Intervenor arg es that the
Commission order permitting i tervention
was an interlocutory order wh ch was not
appealed within three months as called for
by the Act, and that therefor e the Appellant's
right to appeal from said ord r has lapsed.

The section of the Act, 25 U.S.C. § 70s
(b) (1970 Ed.), which is in q estion reads
as follows:

> In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: Provided, That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such

> interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (Emphasis supplied.)

Appellant argues in part that the interlocutory order here in question did not establish the liability of the United States and is therefore not covered by the three months time limit. We need not consider this assertion for it is clear from the above language that Appellant's failure to appeal the order of the Commission was not a waiver of its right to appeal that order in its appeal of the Commission's final determination on Docket 257. The emphasized portions of the above cited section of the Act permit this court to review the question of intervention in this case.

Accordingly, the decisions of the Indian Claims Commission are reversed, both as to

its summary judgment as to recognized title, and as to its order allowing the Wichita Tribe of Oklahoma, et al., to intervene. The cause is remanded to the Commission for further proceedings consistent with this opinion.

Reversed and Remanded.

DURFEE, Senior Judge, concurring in part and dissenting in part:

I concur with the majority in reversing the decision of the Indian Claims Commission which allowed the Wichita Tribe of Oklahoma Affiliated Bands to intervene in this case. However, I respectfully dissent from that part of the majority decision which reverses the order of the Indian Claims Commission for summary judgment for recognized title by appellees Kiowa, Comanche and Apache Tribes to Royce Areas 510 and 511 under the Treaty of 1865.

The majority holds (1) that "the 1865 Treaty was not intended to grant recognized title to the entire tract" described therein, "but to leave its territorial extent for later determination * * * and the claim based on the 1865 Treaty must fail, whether or not the 1867 Treaty was intended as an exercise of the President's 1865 Treaty power"; (2) "that no recognition of title to any specifically bounded tract occurred in 1865, and the first such was in 1867"; and (3) whether the 1867 Treaty constituted action by the Congress or by the President "is actually irrelevant."

These conclusions by the majority are squarely in conflict with the relevant findings and decision of the Indian Claims Commission, with which I concur. In my opinion the grant of title in the 1865 Treaty to the Kiowa, Comanche and Apache Tribes meets the standards of recognized or reservation title, as the Commission determined in citing Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 439, 175 F. Supp. 926 (1959) where this court summarized these standards as follows:

* * * * * * *

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title', 'reservation title', 'recognized title', and 'acknowledged title.' As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways. Tee-Hit-Ton v. United States, 348 U.S. 272; Hynes v. Grimes Packing Co., 337 U.S. 86; Minnesota v. Hitchcock, 185 U.S. 373.

This court further, in Miami Tribe, held that the grant of the right to permanently occupy and use the land ceded by the Treaty until the Miami Tribe should be disposed to sell that land to the United States was

"recognized title" and that whether it was held under recognized title or so-called Indian title or under fee simple title, the land should be valued the same way.

For the purpose of clarity, let us first consider what the United States actually granted the Tribes under the 1865 Treaty before we consider the effect of the Treaty alternative for a limitation of the actual grant by Presidential designation.

The majority finds that "the very language of the grant put the grantees on specific notice that the territorial extent of the grant was uncertain, and yet to be determined." In my opinion, the language of the grant itself was certain and specifically described, by a careful metes and bounds description, a tract of over 39 million acres for an Indian reservation. In the language of the Treaty this tract was the "country embraced within said limits," which the Indians agreed "to remove to and accept as their permanent home," and which was "set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty." Articles III, IV and V of the Treaty refer to this tract as the Indians' "reservation." Upon these solemn assurrances by their Government in the Treaty, the Indians agree to "relinquish all claims or rights on and to any portion of the United States or territories, except such as is embraced within the limits aforesaid," including their claim of aboriginal title to over 60 million acres.

Let us now consider the effect of the clause following the territorial grant:

> ARTICLE II. The United States hereby agree that the district of country embraced within the following limits, or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose, viz: * * *. (Emphasis supplied.)

The Indian Claims Commission interpreted that clause as an alternative, granting the President discretionary power to establish such a smaller reservation by Executive Order if at some indefinite future time the circumstances might, in his discretion, require such action.

I agree with this interpretation by the Commission. The use of the word "or" at the very beginning of the clause clearly means that it was an alternative to an otherwise unconditional territorial grant, an alternative which the President "may" exercise, in his discretion. The Commission has found that "(t) his was never done", 26 Ind. Cl. Comm. at 112, and I agree.

The majority has attempted to distinguish the case of Klamath & Moadoc Tribes v. United States, 85 Ct. Cl. 451 (1937), aff'd, 304 U.S. 119 (1938), and has stated the facts therein, which need not be repeated except as noted herein. The majority states that in Klamath, "the Tribe had entered into a Treaty in 1864 which permitted them to occupy certain

territory 'until otherwise directed by the President * * *'". This Treaty did not merely permit the Klamath Tribe to occupy the territory.

Article I of the Klamath Treaty provided:

> That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians (and) held and regarded as an Indian reservation * * * 85 Ct. Cl. at 454.

The present majority opinion states that "the real point about this Klamath case is that the limitation there involved: 'until otherwise directed by the President' did not expressly relate to the territorial extent of the grant, as the corresponding language does here." I cannot agree; all that I can conclude from reading the language of Article I of the Klamath Treaty as quoted is that the limitation involved did expressly and unmistakably relate to the territorial extent of the grant.

In the Klamath case, the United States contended that the Indian title to 87,000 acres included in the 1864 Treaty was not permanent or exclusive, but merely a right to occupy the lands, and subject to termination by certain articles of the Treaty of 1864. The court there said: "It is asserted that inasmuch as the treaty provisions set aside the delimited reservation to plaintiff Indians, they to occupy

the same 'until otherwise directed by the President of the United States', the act of Congress taking the 87,000 acres was an exercise of this power. We cannot assent to the proposition. The President did not exercise any such power if he possessed it. On the contrary, Congress recognized the Indians' right to the lands and sought to pay for them." * * * 85 Ct. Cl. at 463, 464. (Emphasis added.)

The factual difference between the present case and the Klamath case is apparent, but in both cases the Treaty required delimitation of a reservation by the President. In effect, the Klamath case says that action by the Congress is not action by the President as required by the Treaty, and to this extent the case is in point here.

The majority opinion notes that the parties have conflicting views as to whether the 1867 Treaty constituted action by the Congress or by the President. However, the majority of the court concludes that: "Actually, we think this is irrelevant," since no recognition of title to any specifically bounded tract occurred in 1865 and the first such was in 1867. I cannot agree.

The majority reasons that: "It is not suggested that the Kiowa were so ignorant they actually misunderstood what they were getting, or could have done so." This majority conclusion would require us to believe that the Indians could have understood that the 1865 Treaty grant was a mere permissive use of their reservation until the President acted. They must have

also understood that the grant in the 1865 Treaty of a "reservation" of 39 million acres "for their permanent home * * * set apart for the absolute and undisturbed use and occupation of the tribe" was an empty facade of meaningless words, with no substance behind it. I cannot agree that these illiterate "blanket" Indians could have understood this when they agreed to the 1865 Treaty. In my opinion, they understood these words as translated to them, to mean what they mean in plain and unmistakable English.

In my opinion, they had good reason to understand and believe that in 1865 they got recognized title to a 39 million acre reservation, unless and until the President delimited its area. The majority points out that: "It is only the peculiar mystique of Indian law that allows a question here." Actually it is not Indian law that allows a question here. It was the white man's law for Indians, which by 1946 had become so unjust and inequitable to the Indians as to require the creation of the Indian Claims Commission.[1] This Commission was given power to determine whether Indian treaties were to be revised on several grounds, including mutual or unilateral mistake, unconscionable consideration, violation of fair and honorable dealings, etc.

Acting under this authority, the Commission has made its decision in favor of the Kiowa, Comanche and Apache Tribes.

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[1]Act of August 13, 1946 (60 Stat. 1049 et seq.)

We are now to reverse this decision basically and in essence because of what the majority thinks the Indians understood or could have understood what they were getting in the 1865 Treaty. There is no peculiar mystique of Indian law that allows a question here, nothing esoteric or mystical about what Indian tribes understand that they are getting in a treaty with the United States. The Supreme Court of the United States has spelled this out clearly in Peoria Tribe v. United States, 390 U.S. 468, 472 (1968). The Supreme Court, in reversing this court's judgment stated:

> As the dissenters in the Court of Claims rightly pointed out,
>
> "Indian treaties 'are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.' United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). '(T)hey are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." Tulee v. Washington, 315 U.S. 681, 684-85 * * *'" 177 Ct. Cl. at 771, 369 F. 2d at 1006-1007.

Our court has recently ruled on an interpretation of Indian treaties:

Hebah v. United States, 192 Ct. Cl. 785, 791, 428 F. 2d 1334, 1338 (1970), "* * * Indian treaties should be read, where possible, generously in favor of the Indians. Peoria Tribe v. United States, 390 U.S. 468, 472-73 (1968); Choctaw Nation v. Oklahoma, 397 U.S. 620,631 (1970)"; and Gila River Pima-Maricopa Indian Community v. United States, 199 Ct. Cl. 586, 467 F. 2d, 1351 (1972), "Indian agreements are to be read as the Indians understood and would naturally understand them." The closest the majority has come to any recognition of these broad and generous principles of Indian treaty interpretation in favor of the Indians is that "the court is to interpret the Treaty in a manner not prejudicial to the Indians."

It is in this spirit of strict interpretation that the majority concludes that since no recognition of title to any specifically bounded tract occurred in 1865, and the first was in 1867, the contentions between the parties as to whether the 1867 Treaty constituted action by the Congress or by the President "is irrelevant," (perhaps just as irrelevant as the majority apparently considered the language of the 1865 Treaty referring to the "absolute and undisturbed use and occupation" of a "permanent home" for the appellees).

The majority quotes from Citizen Band of Potawatomie Indians v. United States, 179 Ct. Cl. 473, 391 F. 2d, 614 (1967), on another point but the quotation is also

relevant here as to whether the President or the Congress must act.

> A fair interpretation of the treaty is that the President would select the 144,000 acres in his capacity as "Great White Father" of the Indians as well as head of the United States Government. A callous disregard of the interests of either would be an abuse of discretion. (Emphasis supplied.) 179 Ct. Cl. at 488, 391 F. 2d at 622.

This relationship of the President as "The Great White Father" to his Indian children has been understood by them ever since their first meetings with officials of the United States, when Lewis and Clark summoned them in 1805 to tribal conferences along the expedition's historic route of exploration to the Pacific Ocean. The Indians were told then, and have been told ever since that it is their Great White Father (the President) who will punish them if they are bad, and reward them if they are good. I know of no legal authority, and none has been cited by the majority for its unique proposition that it is irrelevant whether the 1867 Treaty constituted action by the President or by the Congress. In my opinion it is clear that the Indians did not understand this.

The Treaty of 1867 was accomplished by a bill (Act of July 20, 1867, 15 Stat. 17) to establish peace with a large number of Indian tribes, including the appellees, as directed by the Congress. No reference

was made to the 1865 Treaty in the 1867 proceedings or in the Act. In dissenting from the majority decision of the Indian Claims Commission, Chairman Kuykendal has nevertheless made this point:

> The two year period between the signing of the 1865 Treaty and the signing of the 1867 Treaty, although a brief period, is included within a longer period (the tenure of President Andrew Johnson) when the animosity of Congress toward the President was the greatest this country has ever experienced. As we have seen, during the last seven months of this period the President was bereft of power to enter independently into any treaties with Indian tribes or to incur any expense in negotiating a treaty. * * * 26 Ind. Cl. Comm. at 128.

Indeed, when the bill under which the 1867 Treaty was finally accomplished was under consideration by the Senate, it was only because two Senators called attention to the constitutional and legal powers of the President in making Indian treaties that he was even included in the Act as finally adopted (as Chairman Kuykendal points out in his review of its legislative history). In such an atmosphere of unparalleled hostility between the President and the Congress, I cannot agree that it was "irrelevant" as to which one acted under the Act of 1867. At least it was not irrelevant to the Indians, who had been unequivocally assured in the 1865 Treaty that the <u>President</u>

would act, and it was upon this specific assurance that they ceded their claim of aboriginal title to 60 million acres of land. It seems late in the day now to tell them for the first time that this was a mere irrelevant consideration after reducing their claim of aboriginal title to 100 million acres to 39 million acres in 1865, and then in 1867 to three million acres.

Both the United States and the Commission dissent contended that the Treaty of 1867 was an "implementation" of the Treaty of 1865 and constituted action by the President in compliance with the 1865 Treaty in designating the reservation as Royce Area 510. The Commission, after a well-reasoned review of the record, concluded that the President never acted under the 1865 Treaty clause to designate a smaller reservation, and that the 1867 Treaty was not intended to constitute implementation of that clause. Since the majority opinion has in legal effect, disregarded this aspect of the case, because it is "irrelevant" whether the President or the Congress acted, no further discussion is now called for by me in regard to the effect of the 1867 Treaty, except to say that I agree with the above conclusion of the Indian Claims Commission on this point.

Finally, I accept the conclusion of the Indian Claims Commission that the Treaty of 1865 was "a treaty of recognition, the effect of which was to recognize the title of plaintiff tribes and other friendly tribes to Royce Areas 510 and 511." Ac-

cordingly, I would affirm the grant of the motion of appellee Kiowa, Comanche and Apache Tribes of Indians for summary judgment, leaving the remaining issues for further determination, except the claim of intervenor, the Wichita Tribe and Affiliated Bands and Groups of Indians which I agree with the majority opinion, should be denied.

DAVIS, Judge, and KUNZIG, Judge, join in the foregoing opinion concurring in part and dissenting in part.

APPENDIX B

COURT OF CLAIMS

IN THE UNITED STATES COURT OF CLAIMS

App. No. 12-71

THE UNITED STATES, APPELLANT,

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, APPELLEES;

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND AFFILIATED BANDS, ET AL., INTERVENORS AND APPELLEES.

Before COWEN, Chief Judge, DURFEE, Senior Judge, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on motions of the appellees, Kiowa, Comanche and Apache Tribes, filed July 18, 1973, for rehearing and of the Wichita Indian Tribe of Oklahoma, et al., intervenors, filed July 30, 1973, for a rehearing to alter and/or amend the judgment rendered herein on June 20, 1973. Upon consideration thereof,

together with the responses in opposition thereto, without oral argument,

IT IS ORDERED that the said motions be and the same are denied.

IT IS FURTHER ORDERED that the words "is comprised of about half of Area 510 and three-fourths of Area 511 and thus", which words appear at lines 32 and 33 of page 10 of the slip opinion entered herein on June 20, 1973, be and the same are stricken and deleted from the said slip opinion.

BY THE COURT

(Sgd.) Wilson Cowen

Sep 28 1973

Chief Judge

APPENDIX C

24 Ind. Cl. Comm. 405

BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE TRIBE OF INDIANS, Plaintiffs, THE WICHITA INDIAN TRIBE OF OKLAHOMA, et al., Applicants for Intervention, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 257

ORDER GRANTING MOTION TO INTERVENE

UPON CONSIDERATION of the motion of The Wichita Indian Tribe of Oklahoma, et al., and its supplemental statements in support thereof, filed on March 16, 1970, for leave to intervene in the above styled proceedings, the responses of the plaintiffs and defendant in opposition thereto, filed on May 4, 1970, and June 25, 1970, respectively, and pursuant to the Commission's prior decision in the matter of Lipan Apache v. United States (22 Ind. Cl. Comm. 1 (1969), deeming that the parties had adequate notice of the potential claim in intervention,

IT IS ORDERED that the motion for leave to intervene be, and the same hereby is, granted.

Dated at Washington, D.C., this 10th day of February 1971.

(Sgd.) Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

(Sgd.) John T. Vance
John T. Vance, Commissioner

(Sgd.) Richard W. Yarborough
Richard W. Yarborough, Commissioner

(Sgd.) Margaret H. Pierce
Margaret H. Pierce, Commissioner

(Sgd.) Brantley Blue
Brantley Blue, Commissioner

APPENDIX D

22 Ind. Cl. Comm. 1

BEFORE THE INDIAN CLAIMS COMMISSION

THE LIPAN APACHE TRIBE and bands thereof, ex rel., Pedro Mendez and Philemon Venego;	
THE MESCALERO APACHE TRIBE and bands thereof, ex rel., Solon Sombrero, Fred Pellman, Eric Tortilla and Victor Dolan;	
THE APACHE TRIBE OF THE MESCALERO RESERVATION on behalf of, or as successor to, the Lipan Apache Tribe and bands thereof, and the Mescalero Apache Tribe and bands thereof,	Docket No. 22-C
Plaintiffs,	
THE PUEBLO DE SAN ANTONIO DE LA YSLETA DEL SUR, AND THE PIROS, MANSOS AND SUMAS TRIBES, AND THE PUEBLO OF THE TIGUA INDIAN COMMUNITY,	
Intervenors,	
v.	
THE UNITED STATES OF AMERICA,	
Defendant.	

Decided: November 5, 1969.

Appearances:

Abe W. Weissbrodt, Attorney
for Plaintiffs
Tom Diamond, Attorney for
Intervenors
Edwin B. Hatch, with whom
was Mr. Assistant Attorney
General Shiro Kashiwa,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The Pueblo De San Antonio De La Ysleta Del Sur Tribe, also known as the Tigua Indian Community, has moved for leave to intervene in the claim of The Lipan Apache Tribes, et al v. United States, Docket No. 22-C, presently before the Commission upon remand from the United States Court of Claims, 180 Ct. Cl. 487 (1967). Intervenors claim, in addition to representing the Tigua Pueblo, to be entitled to present the claims of the Senecu Piros, the Mansos and the Sumas, which tribes are alleged to be amalgamated into the Pueblo De San Antonio De La Ysleta Del Sur. In the alternative, intervenors have asked that their petition be permitted to stand as an original petition and a new cause of action before the Commission or on appeal in the Court of Claims. They claim

damages and ask for other relief for the taking of certain lands, hunting and fishing rights, mineral rights and water rights in Texas. The lands claimed by intervenors are lands which plaintiffs claim were continuously used and occupied for several hundred years prior to the admission of Texas into the Union, to the exclusion of other people, by the Mescalero Apache Tribe and bands thereof.

Initially it should be noted that the amount of plaintiffs' recovery will be the same whether or not the Tiguas intervene because any lands exclusively used and occupied by ancestors of the Tiguas could not be the subject of an award to plaintiffs. On the other hand, the Government could be subjected to additional liability by reason of the Tiguas' intervention. However, the Government does not object to such intervention if the Commission finds that certain statutes cited by the Government do not bar the claim. In addition, no delay is likely in the case if intervenors' petition is granted, since the extent of Tigua use and occupation is likely to be at issue in any event in order to show the extent of use and occupation by the Mescalero Apache.

However certain jurisdictional objections which have been raised must be resolved since even consent of all the parties is not sufficient to over come the absence of jurisdiction over the

subject matter of the claim. The first jurisdictional problem is that of the limitation period in Section 12 of the Indian Claims Commission Act. If, though, the claim of the Tiguas is part of the same cause of action as the claim in Docket 22-C, it relates back to the timely filing of Docket 22. Thus the questions of intervention and of timeliness turn upon the same issue: Is the claim of the Tiguas the same cause of action as is presently stated in Docket 22-C?

A cause of action is defined in scope by the conduct, transaction or occurrence out of which it arose. In the present case both plaintiffs and intervenors point to the same conduct by the United States as the basis for their claims. They allege that the United States transferred public lands to Texas without requiring the State to protect aboriginal occupancy rights. This, they contend, was a breach of a duty assumed by the United States toward the Indian occupants of the area. We feel that this common alleged source of injury is sufficient to permit intervention. The question of the existence and scope of the government's duty to the Texas Indians is before the Commission in this case on remand from the Court of Claims.

Our conclusion to permit intervention is supported by two cases decided by the Court of Claims. In The Blackfeet and Gros Ventre Tribes, et al v. United States, 162 Ct. Cl. 136 (1963), the Court allowed the Assiniboine Tribe to intervene when its claim arose out of the same cession

agreement as did the claim of plaintiffs in the action. In Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570 (1967), the Court permitted the Snoqualmie Tribe to maintain an action on behalf of the Skykomish Tribe as well as on its own behalf, even though the claim for the Skykomish was inserted into the pleadings after the limitations date. The Court reasoned that the pleading of the Point Elliott Treaty, from which both claims arose, sufficiently put the Government on notice of the possibility of a claim on behalf of the Skykomish.

In the same way, we feel that the filing of the present action put the Government on notice that it would be required to litigate the question of title to all the land in Texas included in the claim in Docket No. 22-C. Reference even to the most basic sources would have informed the Government that the Tiguas might have had a claim to part of this land. Thus the Handbook of American Indians, Bureau of American Ethnology, Bul. 30, pt. 2 (1912), includes a history of the Tiguas and indicates that a portion of them lived at Isleta del Sur, Texas, Id. at 747-749.

Assuming that the Tiguas would normally be able to intervene under these circumstances, we are faced with the question of whether a different result is dictated by the Act of April 12, 1968, 82 Stat. 93, which formally recognized the Tiguas and provided:

> Responsibility, if any for the Tiwa Indians of Ysleta del Sur is herewith transferred to the State of Texas. Nothing in this Act shall make such tribe or its members eligible for any services performed by the United States for Indians because of their status as Indians nor subject the United States to any responsibility, liability, claim, or demand of any nature to or by such tribe or its members arising out of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians, shall be applicable to the Tiwa Indians of Ysleta del Sur.

This Act was intended to effectuate a specific limited result. As stated in the Senate Report on the measure:

> The Texas constitution contains no express authority for the recognition of or assistance to Indian tribes. The Legislature of the State of Texas has enacted legislation for the benefit of the Tiwa Indians. In order to overcome the lack of authorization in the State constitution to treat Indians differently than other citizens, the enactment of H.R. 10599 is necessary. (S. Rep. 1070, 90th Cong., 2d Sess., reprinted at 114 Cong. Rec. 8436 (April 1, 1968).

Thus Congress was attempting to allow Texas to aid the Tiguas without changing their relationship to the Federal govern-

ment. The Bureau of Indian Affairs had never recognized responsibility for the Tiguas. The disclaimer in the Act was necessary to prevent its being interpreted as making the Tiguas eligible for Federal services which they formerly had not received, and to prevent any future claims that the Government breached some duty to the Tiguas by transferring responsibility for them to the State of Texas. Nothing in the Act however indicates that Congress intended to remove from the Tiguas any preexisting rights. In particular, there is no indication that this Act intended to preclude the Tiguas from asserting a claim under the Indian Claims Commission Act which was so painstakingly drafted to allow the assertion of every kind of claim by a broadly defined class of claimants. If anything, the indication is directly to the contrary. In debate on the bill, its sponsor in the Senate stated:

> This recognition by the Congress of the United States will give them (the Tiguas) the juridical status that is their just due. (114 Cong. Rec. 8436 (April 1, 1968).

We therefore hold that the Act of April 12, 1968 does not preclude the filing of a claim by the Tigua Indians before the Indian Claims Commission.

The Tiguas are entitled to maintain a claim before this Commission only if they are a tribe, band or other identifiable group of Indians. The articles reprinted in the Congressional Record during the debate on the Act of April 12, 1968, 114 Cong. Rec. 8428-8435 (April 1, 1968),

and the references to the Tiguas in standard reference works, Handbook of American Indians, supra; Swnton, The Indian Tribes of North America, Bureau of American Ethnology, Bul. 145 (1952, republished 1968) 344-346, leave no doubt that the Tiguas are an identifiable group of Indians as that term is used in Section 2 of the Indian Claims Commission Act. No determination of the intervenor's claim to be entitled to maintain an action on behalf of the Senecu Piros, the Mansos, and the Sumas can be made without the taking of further evidence on the question.

Finally we are faced with the contention that no attorney's contract has been approved by the Secretary of the Interior, pursuant to 25 U.S.C. Secs. 81, 82-84. A contract submitted for approval has been returned to intervenors' attorney without comment by the Commissioner of Indian Affairs on the ground that the Bureau of Indian Affairs is without authority to act on the contract, at least until this Commission determines that intervenors are a tribe, band, or identifiable group of Indians entitled to maintain a claim. It is our conclusion that approval of the contract between intervenors and their attorney is not required. Section 15 of the Indian Claims Commission Act provides that employment of attorneys by claimants other than tribes organized pursuant to 25 U.S.C. §476 "shall be subject to the provisions of" 25 U.S.C. §§ 81, 82-84. Thus the right to counsel guaranteed by Section 15 of the Indian Claims Commission Act was not to be read as a pro tanto repeal of the requirements

for approval of attorneys' contracts for tribes under Federal jurisdiction. Section 15, however, does not add any new requirement of approval for attorneys' contracts beyond those existing in 25 U.S.C. §§81, 82,-84. The Act of April 12, 1968 transferred to the State of Texas all Federal responsibility, if any, for the Tiguas. Even prior to this legislation the Bureau of Indian Affairs took the position that the tribe was not entitled to any special Federal services. Since the Federal government now clearly has no special responsibility to the Tiguas, the special protective provisions of 25 U.S.C. §§81, 82-84 do not apply to them. Contract approval being unnecessary under these provisions, the Tiguas' right to retain counsel pursuant to Section 15 of the Indian Claims Commission Act is unconditional. It should be noted that Section 15 of the Indian Claims Commission Act provides:

> The fees of such attorney ... shall, unless the amount of such fees is stipulated in the approved contract between the attorney ... and the claimant, be fixed by the Commission ... (emphasis added)

Since no approved contract exists, the attorneys' fees remain subject to determination by the Commission under the standards set out in Section 15.

For the above reasons, the Motion for Leave to Intervene filed by the Pueblo De San Antonio De La Ysleta Del Sur is granted.

(Sgd.) Brantley Blue

Brantley Blue, Commissioner

Concurring:

(Sgd.) Jerome K. Kuykendall
Jerome K. Kuykendall,
Chairman

(Sgd.) John T. Vance
John T. Vance, Commissioner

(Sgd.) Margaret H. Pierce
Margaret H. Pierce,
Chairman

Commissioner Yarborough took no part in the consideration of or decision on the motion.

APPENDIX E

Nov 9 1971

BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, Plaintiffs, THE WICHITA INDIAN TRIBE OF OKLAHOMA, AND AFFILIATED BANDS, ET AL., Intervenors, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 257

NOTICE OF APPEAL

Comes now the defendant, the United States of America, by its Assistant Attorney General, and gives notice of appeal to the United States Court of Claims from the interlocutory order of the Indian Claims Commission entered in this case on August 9, 1971.

The points relied upon by the defendant are: (1) That the Indian Claims Commission erred as a matter of law in holding that the title to approximately 39 million acres of land in Texas and Oklahoma was recognized in the plaintiffs

and other tribes by the defendant in the Treaty of October 18, 1865, 14 Stat. 717.

(2) That the Commission erred as a matter of law in granting plaintiffs' motion for summary judgment while there was an outstanding issue of fact still in dispute.

(3) That the Commission erred in granting plaintiffs' motion for summary judgment when the law of the case established by the Commission in its Order of August 4, 1960, was that the plaintiffs were not entitled to said judgment.

(4) That the Commission erred as a matter of law in holding that the defendant, the United States, recognized title to lands lying in the State of Texas, which lands were never a part of the public domain and were not owned by the United States, nor had the United States any authority to dispose of them.

(5) That the Commission erred as a matter of law in failing to give effect to the prevailing presumption that the public officers performed their duties of office regularly and legally in compliance with controlling statutory provisions and in good faith and in the exercise of sound judgment.

(6) That the Commission erred as a matter of law when it entered its Order of February 10, 1971, permitting the Wichita Indian Tribe of Oklahoma and Affiliated

Bands to intervene in this case nearly 20 years after August 13, 1951, after which date the Commission is without jurisdiction to hear new claims. 60 Stat. at 1052, 25 U. S. C. sec. 70k.

(7) That the Commission erred as a matter of law in its tacit refusal to dismiss the original plaintiffs herein for their failure to comply with section 27 of the Indian Claims Commission Act, 81 Stat. at 11, 25 U.S.C. sec. 70v(1), which requires dismissal if the plaintiff fails to proceed with the trial on the date set for that purpose.

Three copies of this Notice of Appeal are filed herewith for service on the attorneys of record for plaintiffs and intervenors in accordance with Rule 171 (c) of the Court of Claims. Defendant respectfully requests notification of the plaintiffs and intervenors.

Dated November 9, 1971.

(Sgd.) Shiro Kashiwa

Shiro Kashiwa
Assistant Attorney General

(Sgd.) Bernard M. Sisson

Bernard M. Sisson
Attorney

APPENDIX F

Indian Claims Commission Act,
August 13, 1946, c. 959,
60 Stat. 1050, 1052, 1054:

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * *

(25 U.S.C. 70a).

Sec. 12. The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. (25 U.S.C. 70k).

Sec. 20 (c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U.S.C., sec. 288, as amended. (25 U.S.C. 70s (c)).

APPENDIX G

Filed Mar 16 1970

IN THE
INDIAN CLAIMS COMMISSION
OF THE UNITED STATES

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, PETITIONERS, THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES, PETITIONERS AND INTERVENORS, vs. THE UNITED STATES OF AMERICA, DEFENDANT.	DOCKET NO. 257

COMPLAINT IN INTERVENTION AND IN THE ALTERNATIVE AN ORIGINAL PETITION OF THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES.

TO THE HONORABLE COMMISSIONERS OF THE
INDIAN CLAIMS COMMISSION:

Comes now the Wichita Indian Tribe of Oklahoma and Bands and Groups of Indians which have been or which are affiliated with the Wichita Indian Tribe of Oklahoma, including but not limited to the Wichita, Wacos, Keechis, and Towaconies and represented herein by and through Omer Luellen, Attorney at Law; the said Omer Luellen having an approved Attorney Claims Contract with the Wichita Indian Tribe of Oklahoma of which Contract a certified copy of same has been duly filed with the Clerk of the Indian Claims Commission pursuant to Rule 34a, and for their Complaint and cause of action state as follows, to-wit:

I

That they are confederated tribes of Indians having unity of interest and have been so recognized by the Defendant, the United States of America, and at all times herein pertinent they have been under the control and guardianship of the Defendant.

II

Your Petitioners and Intervenors further state that they are, at the present time, residents of the State of Oklahoma and have a recognized tribal organization recognized as such by the administrative officials of the United States charged with the responsibility and duty of supervising and administering the affairs of Indian Tribes.

III

Your Petitioners and Intervenors further state that this action is filed under the authority of and pursuant to the Act of Congress approved on August 13, 1946 (60 Stat. 1049, 1055) as amended and supplemented, Act of July 24, 1956 (70 Stat. 624), Act of June 16, 1961 (75 Stat. 92), Act of November 4, 1963 (77 Stat. 301), Act of September 19, 1966 (80 Stat. 814) and Act of April 10, 1967 (81 Stat. 11), (25 U.S.C. 70-70v-1).

IV

Your Petitioners and Intervenors further state that their claims come within the preview of Section 2 of the said Act of August 13, 1946, as amended.

V

Your Petitioners and Intervenors further state that no other person or persons, tribe or band has or has ever had any interest in the claims of the Petitioners and Intervenors and there has been no assignment or transfer of said interest by any person or persons, and your Petitioners and Intervenors have never been paid any part of the claims herein recited and are justly entitled to recover same.

VI

Your Petitioners and Intervenors further state that by the Act of Congress approved June 4, 1924 (43 Stat. 366), Congress

passed an Act which granted the Wichita and affiliated bands of Indians in Oklahoma the right to submit their claims in the Court of Claims against the United States for a determination of the amount due the said Indian Tribes under any treaties, laws, or agreements of Congress or for the misappropriation of any of the funds of the said tribe or bands or for the failure of the United States to pay said tribe or bands any moneys or other property due and pursuant to the said Act of June 4, 1924, the Wichita and affiliated bands of Indians of Oklahoma; being the same group of Indians as the Petitioners and Intervenors herein, filed their action in the Court of Claims shortly after the passage of said Act and the said case being No. E-542.

VII

Your Petitioners and Intervenors further state that in the Court of Claims, Case E-542, the Wichita Indian Tribe of Oklahoma and its affiliated bands claimed aboriginal title and treaty title to that portion of Oklahoma generally West of the Cross Timbers and between the Canadian River and the Red River with the 100th Meridian being the West boundary of the said lands claimed in what is now the State of Oklahoma, and the said Wichita Indian Tribe of Oklahoma and its affiliated bands also claimed a considerable area located in the State of Texas generally between the Brazos River on the South and the Red River on the North generally between the 98th Meridian East and the 100th Meridian

West and in the said action filed in the Court of Claims, E-542, the Wichita and affiliated bands of Indians of Oklahoma claimed that they had aboriginal title and that they had had the necessary possession of said lands from time immemorial to establish aboriginal title and that they also had treaty title to the said lands and that their title and right to possess said lands had been recognized by the United States in various treaties and in particularly the Treaty of August 24, 1835, and proclaimed on May 19, 1836 (7 Stat. 474) and by the Treaty of May 15, 1846, ratified on March 8, 1847 (9 Stat. 844). In the action in the Court of Claims, the Wichita and affiliated bands of Indians of Oklahoma also made claim against the United States for personal property destroyed when the Wichita Indians of Oklahoma and particularly their affiliated bands were taken out of the State of Texas by the troops and Government officials of the United States and brought into what is now the State of Oklahoma in the year 1859.

VIII

Your Petitioners and Intervenors further state that a decision was rendered by the Court of Claims, styled, "Wichita Indians vs. United States", 89 Court of Claims 378 (1939) and in the opinion rendered by the Court of Claims in 1939, the Court of Claims held that the special jurisdictional Act of June 4, 1924 (43 Stat. 366) did not give jurisdiction to the Court of Claims to determine the validity of the claimed aboriginal Indian title against the United States.

The Court of Claims in said decision further held that aboriginal title had been extinguished to the lands West of the Cross Timbers within the State of Oklahoma by the Treaty of August 24, 1818 (7 Stat. 176) wherein the Quapaw Indians ceded the Territory in question to the United States and the Court of Claims again reiterated that the said special jurisdictional act for the benefit of the Wichita Indian Tribe was not sufficiently broad in its terms to confer jurisdiction upon the Court of Claims to award compensation to the Wichita Indians of Oklahoma and its affiliated bands based on immemorial possession and that the Court of Claims did not have jurisdiction by the terms of said Act to award compensation on aboriginal title because the Court of Claims was bound by treaties, specifically including the Treaty with the Quapaw Indian Tribe of August 24, 1818 (7 Stat. 176). This conclusion, of course, is not the applicable law under the Indian Claims Commission Act of August 13, 1946. (See paragraph XXII of this Petition as hereinafter set out.)

The Court of Claims in the said decision further held that although the records show that the Wichita Indian Tribe of Oklahoma and its affiliated bands had for many years prior to 1845 been in possession of a considerable area within the State of Texas to which area they claimed aboriginal title and that even though the Wichita Indians and affiliated bands were compelled to abandon their Texas lands and were removed to Oklahoma

in 1859, the United States was under no liability to compensate the Indians for their loss of lands in the State of Texas and that title to the said lands in Texas inured to the State of Texas upon the forced abandonment of the said lands by the said Indian Tribes. This conclusion, of course, is not the applicable law under the Indian Claims Commission Act of August 13, 1946. (See paragraph XXII of this Petition as hereinafter set out.)

IX

Your Petitioners and Intervenors further state that when they were compelled to abandon their lands in Texas, which forced abandonment has never been disputed even by the Court of Claims in its 1939 decision, your Petitioners and Intervenors should have been protected by the Defendant, the United States of America, and the Defendant is liable to your Petitioners and Intervenors for the reason that your Petitioners and Intervenors come within the preview of the holdings and legal determinations relative to liability of the United States to Indian Tribal claimants for a similar situation made by a decision rendered by the Court of Claims in the Lipan Apache Tribe vs. United States, 180 Court of Claims 487 (1967), and your Petitioners and Intervenors further state that the Petitioners and Intervenors herein, namely, the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups, were parties to the same treaty with the United States that the Lipan Apache Tribe made with the United States and which Treaty the Court of Claims held

in said decision was sufficient reason to protect the Indian Tribes from compulsory acquisition of their property by and through the United States; the said Treaty in question being the Treaty of May 15, 1846, ratified on March 8, 1847 (9 Stat. 844).

X

Your Petitioners and Intervenors further state that as heretofore recited, the Court of Claims in the opinion rendered in Case No. E-542, stated that aboriginal title was extinguished to the lands West of the Cross Timbers and South of the Canadian River on the North and to the Red River on the South and to the 100th Meridian on the West by the securing of said lands from the Quapaws pursuant to a Treaty between the Quapaw Tribe and the United States, which was the Treaty of August 24, 1818 (7 Stat. 176). After the passage of the Indian Claims Commission Act of August 13, 1946, the Quapaw Indian Tribe employed knowledgeable Attorneys and filed a claim before the Indian Claims Commission against the United States pursuant to the jurisdiction given by the Indian Claims Commission Act and the claim in question was styled, "The Quapaw Tribe of Indians vs. United States", being Docket No. 14 before the Indian Claims Commission. One of the principal portions and parts of the said claim in Docket No. 14 was the claim that the United States had not paid sufficient compensation to the Quapaw Indian Tribe for the lands that they had secured from the Quapaw Indian Tribe between the Red River and the Canadian

River within the State of Oklahoma pursuant to the cession of said lands made to the United States pursuant to the Treaty of August 24, 1818. Consequently, one of the material facts that became necessary to determine for the purpose of establishing or denying the claim of the Quapaws for additional compensation for said lands became the determination as to whether or not the Quapaws had aboriginal title to the said area in question. The United States of America, the Defendant in said claim, filed in said Docket No. 14 a Brief or instrument entitled "Defendant's Objections to Plaintiffs' Proposed Findings of Fact, Request for Findings of Fact, and Brief", which document was prepared by A. Devitt Vanech, Assistant Attorney General, and Leland L. Yost, Attorney for the United States of America, the Defendant, and at Pages 109 and 110 in said document, the Assistant Attorney General for the United States of America made a request that the Indian Claims Commission make a finding of fact which Request for said finding of fact was request No. 6 and the said requested finding is as follows:

"FINDING 6

THE WICHITA

This group was a confederacy of Caddoan-speaking tribes who ranged from the middle Arkansas River in Kansas to the Brazos River, Texas, in historic times. They are closely allied with the Kichai, both linquistically and politically. They first came to the notice of Europeans in 1541 when contacted by

> Coronado's party somewhere in central Kansas. They next appear in history in 1719 when the French officer La Harpe visited a large encampment of Wichita on the South Canadian River in what is now Oklahoma. This encampment numbered 6,000 Indians. Although in the next 100 years they were gradually pushed west and south,[298] the western part of the Quapaw cession of 1818 was occupied by or under the domination of the Wichita and Kichai during a large part of the 18th century.[299] This is substantiated by, inter alia, Captain Marcy's Map of 1858 which shows old Wichita villages in the southern Oklahoma zone, one of these villages lying just west of meridian 99 west and just south of parallel 35 north.[300]"

Your Petitioners and Intervenors further state that, apparently, this Claims Commission gave considerable credence to the requested finding of fact made by the United States of America because when this Commission rendered its opinion in Docket No. 14 on March 15, 1951,

---

[298] In 1772, they were living in towns on the Brazos River, Texas. R. 488.

[299] R. 685-686.

[300] R. 490; Def. Ex. 5-W-7. See also Def. Ex. 19 (1), p. 688.

1 Ind. Cl. Comm. 474, we find at 487, the following statement:

> "In reaching the conclusion that the Quapaw Tribe has failed to prove aboriginal possession of the territory claimed in Count I of the petition, we have not overlooked the statement contained in the treaty commissioners' letter transmitting the 1818 treaty to the Secretary of War (Plaintiffs' Ex. 13), dated September 6, 1818, in which they stated that the tract ceded 'at all times heretofore has been considered their property as well by the former governments as by the Osages their neighbors.' The quoted remark was not, perhaps, intended as an important statement of fact but rather as emphasizing their success and as an incidental reference to their impressions of the situation; however, there is no proof in the record to support any such remark. We, therefore, cannot accept it as controlling our determination of Count I.
>
> Counsel for plaintiffs further urge upon us the fact that there is no showing of any claim by any other tribe to the territory covered by the treaty. It is true that there is no direct evidence of any other tribes claiming any part of the Quapaw cession, but there is proof that other tribes occupied part of the area, such as the Caddo and WICHITA, and assuming it to be a

fact that there were no Indian claimants to the territory except the Quapaw, does it help the Quapaw?"

XI

Your Petitioners and Intervenors further state that subsequent thereto, as will be hereinafter set out, the Kiowa, Comanche and Apaches did file a claim for aboriginal title to the area in question and the claim of the Kiowa, Comanche and Apache Tribes was filed subsequent to the rendering of the decision by the Indian Claims Commission in Docket No. 14, and your Petitioners and Intervenors wish to further state that they are certain that this Honorable Commission is cognizant of the fact that the decision of the Indian Claims Commission in the Quapaw case, Docket No. 14 was substantially upheld by the Court of Claims on appeal in Quapaw Tribe of Indians vs United States, 120 Fed. Supp. 283, 128 Ct. Cls. 45 at 49.

XII

Your Petitioners and Intervenors further state that on August 9, 1951, the Kiowa, Comanche and Apache Tribes of Indians, as Petitioners, filed before the Indian Claims Commission, being Docket No. 257, a claim against the United States of America, as Defendant, for aboriginal title to the following lands, to-wit, which claim is set out in Paragraph 9 of the original Petition of the Kiowa, Comanche and Apache Tribes of Indians, which Paragraph 9 recites as follows:

"9. In 1835 and prior thereto, the Kiowa, Comanche and Apache Tribes of Indians had actual use and occupation of a territory of country comprising generally all of western and northwestern Texas, eastern New Mexico, the western portion of Oklahoma, the southeastern corner of Colorado, and the southwestern corner of Kansas, and bounded generally as follows, to-wit: On the north by the rivers Cimarron, Arkansas ans Las Animas; on the west by the rivers Pecos and Canadian, on the south by the Rio Grande River and on the east by a line generally in the vicinity of the 98th Meridian. The territory mentioned above is more particularly set out and described on Map No. 57, entitled Texas and Portions of Adjoining States, in Part 2 of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897, being the territory designated thereon as Tracts Nos. 478, 511 and 510."

XIII

Your Petitioners and Intervenors further state that the said Kiowa, Comanche and Apache Tribes of Indians in Docket No. 257 also claimed that their title to the said lands in question had been recognized by the United States pursuant to treaties and agreements as more fully set out in the 10th Paragraph of the original Petition filed herein by the Kiowa, Comanche and Apache Tribes of Indians, which Paragraph 10 recites as follows:

"10. The continuous use and occupancy of the territory described in paragraph 9 by petitioners was officially recognized by the United States in treaties and otherwise. It is alleged that such recognition is contained in the following treaties:

Treaty of August 24, 1835, with Comanche and others; 7 Stat. 474; 2 Kapp. 435.
Treaty of May 26, 1837, with Kiowa and Apache (the Apaches therein being designated Ka-ta-ka), and others; 7 Stat. 533; 2 Kapp. 489.
Treaty of May 15, 1846, with Comanche and others; 9 Stat. 844; 2 Kapp. 554.
Treaty of July 27, 1853, with Comanche, Kiowa and Apache; 10 Stat. 1013; 2 Kapp. 600.
Unratified treaty of April 6, 1863, with Comanche, Kiowa and Apache."

XIV

Your Petitioners and Intervenors further state that a final judgment has never been rendered in said Docket No. 257 pending before the Indian Claims Commission, heretofore referred to, and in order to properly determine title to the said lands claimed by the Kiowa, Comanche, and Apache Tribes of Indians, your Petitioners and Intervenors should be allowed to intervene in Docket No. 257 for the reasons heretofore set out and for the reasons to be hereinafter set out.

XV

Your Petitioners and Intervenors further state that they desire to plead affirmatively the reasons that they have not filed a claim before the Indian Claims Commission prior to this time claiming aboriginal title to a considerable portion of the same lands for which aboriginal title is claimed by the Kiowa, Comanche and Apache Tribes of Indians in Docket No. 257.

XVI

Your Petitioners and Intervenors further state that immediately after the Court of Claims held against the Wichita Tribe in the year 1939, 89 Ct. of Cls. 378, their Attorney at that time, Charles J. Kappler, resigned as Attorney and had his Attorneys Contract with the Wichita Tribe cancelled and a photo copy of the Western Union Telegram of resignation is found at Page VI of the Appendix to the Brochure Brief for the Benefit of the Wichita Indian Tribe of Oklahoma dated May, 1969, which Brochure Brief contains 25 pages in the Brief proper and 19 pages in the Appendix to the said Brochure Brief and the said Brochure Brief, together with the Appendix thereto, is incorporated herein in this Complaint and Petition by reference thereto.

XVII

Your Petitioners and Intervenors further state that Charles J. Kappler gave as his reason for resigning as

Attorney for the Wichita Indian Tribe of Oklahoma the reason that the Court of Claims did not have proper jurisdiction and Attorney Kappler suggested that a broader jurisdictional act should be passed by Congress for the benefit of the Wichita Indian Tribe of Oklahoma, which, of course, was accomplished for all Indian Tribes when the Indian Claims Commission Act of August 13, 1946, was enacted. (See Paragraph XXII of this Petition as hereinafter set out).

XVIII

Your Petitioners and Intervenors further state that after the resignation of Charles J. Kappler as Attorney for the Wichita Indian Tribe of Oklahoma and its affiliated bands, the said Wichita Indian Tribe attempted later to hire Attorneys or law firms to represent the said Tribe and file their claim against the United States pursuant to jurisdiction granted for claims against the United States by the Indian Claims Commission Act of August 13, 1946. (60 Stat. 1049,1055).

XIX

Your Petitioners and Intervenors further state that Frank Miller, as Chairman of the Tribal Council of the Wichita Indian Tribe and affiliated bands, made a determined effort to hire legal counsel to file in the Indian Claims Commission, the claims of the Wichita Indian Tribe and its affiliated bands against the United States before the

running of the normal five (5) year Statute of Limitations. The Wichita Indian Tribe of Oklahoma and its affiliated bands were unsuccessful in securing an Attorneys Contract with any knowledgeable Attorney or law firm and letters refusing employment are set out in the Appendix to the Brochure Brief for the benefit of the Wichita Indian Tribe of Oklahoma dated May, 1969, pages 1 through 16 of said Appendix. The Wichita Indian Tribe of Oklahoma was unable to employ legal counsel for many years because the Attorneys and law firms contacted were of the opinion that the decision rendered by the Court of Claims in 1939 against the Wichita Indian Tribe of Oklahoma 89 Ct. Cls. 378 (1939) was res judicata for lands in Western Oklahoma and Northern Texas for any claims that might be filed before the Indian Claims Commission for the same area of land in question. Your Petitioners and Intervenors herein further state that the Attorneys and law firms contacted were prominent Attorneys and law firms handling the claims of various Indian Tribes before the Indian Claims Commission.

XX

Your Petitioners and Intervenors further state that they were never able to employ legal counsel to represent the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups until a Claims Attorney Contract was consumated recently with Omer Luellen on the 17th day of May, 1968, and that after said employment, the said Omer Luellen immediately began to prepare legislation for the benefit of the

Wichita Indian Tribe of Oklahoma and that said legislation has been introduced in Congress in both the House and Senate. Your Petitioners and Intervenors further state that at the present time, legislative hearings have never been held before the proper Committees relative to the said legislation, and your Petitioners and Intervenors are of the opinion that there may be considerable difficulty and delay in securing the passage of the said legislation and there may be considerable difficulty in securing the approval of said legislation by the President of the United States if passed by Congress.

XXI

Your Petitioners and Intervenors further state that it was their original plan to secure the passage of the legislation by Congress allowing them to file their claims against the United States for the wrongful taking of aboriginal title to a large portion of the same lands which they recently ascertained are the same lands for which aboriginal title is being claimed by the Kiowa, Comanche, and Apache Tribes of Indians in Docket No. 257 before the Indian Claims Commission. Your Petitioners and Intervenors further state that after ascertaining the duplication of the claim for aboriginal title to said area by the Kiowa, Comanche, and Apache Tribes of Indians and the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups, this Honorable Commission will determine that it will be to the best interest of everyone and especially the

United States of America to decide all of the issues in one hearing, which procedure will be permissible if your Petitioners and Intervenors are permitted to intervene in Docket No. 257 pending before the Indian Claims Commission.

XXII

Your Petitioners and Intervenors further state that the decision of the Court of Claims, 89 Ct. Cls. 378 (1939) is not res judicata to the present claim of the Wichita Indian Tribe of Oklahoma and its affiliated bands against the United States as so cogently stated in the Lipan Apache Tribe vs. United States, 180 Ct. Cls. 487 which opinion gives the present interpretation of the now applicable law at Pages 499 and 500 as follows, including Footnite 4, which Footnote 4 is of particular interest to your Petitioners and Intervenors herein:

> "The problem then is whether the United States can be held liable in this proceeding for violating the appellants' aboriginal rights of ownership. The Indians have stated two possible bases for recovery. First, they say that in 1858 and 1859 open warfare broke out in which United States officers, agents, and troops joined with Texas forces to drive the Apaches from their lands. Second, they claim the United States should be held to account for its failure to intervene (when it was under an alleged duty

so to act) to protect their lands from being settled under the State of Texas' public lands program. The Claims Commission held that these assertions fail to state causes of action against the Government because the United States has never held a proprietary interest in the Texas lands.

While such a finding of government ownership might have been required before Congress promulgated the Indian Claims Commission Act, it is no longer a prerequisite to every suit.[4] We

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[4]The Commission placed special reliance on this court's decision in Wichita Indians v. United States, 89 Ct. Cl. 378 (1939), in which we refused to hold the United States liable for removing Indians from the lands in Texas 'for their own protection and safety * * *' (412). The opinion first found that the claim of original title 'is not sustained by the evidence and cannot be allowed' (89 Ct. Cl. at 414, 416), but later said (at 422), that 'In these circumstances the United States cannot be held liable to compensate these Indians for the loss of their lands in the State of Texas, in and to which the United States had no right, title or interest before or after the Indians were compelled to abandon them.' This decision, rendered under a special jurisdictional act, did not, of course, take into account the new causes of action subsequently created by the Indian Claims Commission Act and should not be interpreted as limiting the scope of the remedies afforded by that Act. * * *

have often noted that the Claims Commission Act affords new causes of action recognizing liability in the United States where none had previously existed. See, e.g., Creek Nation v. United States, 168 Ct. Cl. 483,489 (1964); United States v. Seminole Nation, 146 Ct. Cl. 171, 178, 173 F. Supp. 784, 788-789 (1959). These new causes of action extend to 'extra-legal or moral claims of Indians against the United States * * *'. Otoe & Missouria Tribe v. United States, 131 Ct. Cl. 593, 621, 131 F. Supp. 265, 283 (1955), cert. denied, 350 U.S. 848. Our previous rulings clearly indicate that under the Act the United States, even though it never had title to the disputed land, may be held responsible for damage caused to Indian tribes with respect to that land."

XXIII

Your Petitioners and Intervenors further state that they have the legal right to intervene in this matter even though your Petitioners and Intervenors were not original parties in the original claim and even though this Petition for Intervention has been filed after August 13, 1951, and this Commission will have jurisdiction in this matter if intervention is granted to your Petitioners and Intervenors pursuant to the applicable guide lines as more fully set out by the Court of Claims and the Indian Claims Commission as follows:

Blackfeet and Ventre Tribe et al, vs. United States, 162 Ct. Cls. 136 (1963)

The Snoqualmie Tribe of Indians vs. United States, 178 Ct. Cls. 570 (1967)

United States vs. Northern Paiute Nation, 183 Ct. Cls. 321 (1968)

The Yankton Sioux Tribe of Indians vs. United States, 175 Ct. Cls. 564 (1966)

Lipan Apache Tribe et al., vs. United States, Opinion of the Indian Claims Commission, Docket No. 22 C issued on November 5, 1969, 22 Ind. Cl. Comm. 1

The Yankton Sioux Tribe of Indians vs. United States, Opinion of the Indian Claims Commission, Docket No. 332 C issued on December 17, 1969, 22 Ind. Cl. Comm. 344.

XXIV

Your Petitioners and Intervenors further state that for more than one hundred (100) years past, your Petitioners and Intervenors have been making repeated and consistent claims against the United States for the wrongful taking of their lands by the United States of America within the present State of Oklahoma and within the present State of Texas.

XXV

Your Petitioners and Intervenors further state that they had a valid aboriginal title established by their occupation and use and by any other factor necessary to establish their valid aboriginal title to the Region and Country lying between the Canadian River in Oklahoma on the North and the Brazos River in Texas on the South and from the Cross Timbers at almost the 98th Meridian to the East with the West line of said area being a line running North and South along the 100th Meridian between the Brazos River and the Canadian River. Your Petitioners and Intervenors further state that the area for which they had aboriginal title is estimated to contain approximately thirteen million two hundred thousand acres of land. Your Petitioners and Intervenors further state that they had made their home and had been in control and possession of the said Region and Country for more than two centuries, or at least, the necessary time to establish a valid aboriginal title to the said Region and Country. Your Petitioners and Intervenors further state that their claim of aboriginal title to the said Region and Country was not questioned until they were dispossessed of said lands and area just prior to or subsequent to the Civil War, and your Petitioners and Intervenors further state that at no time up to and including the present time, have they voluntarily relinquished or ceded their claim to the said Region and Country in question to the United States of America, except by an agreement with the United States

ceding a small portion of said area and lands as hereinafter set out in Paragraph XXVI.

XXVI

Your Petitioners and Intervenors further state that on June 4, 1891, your Petitioners and Intervenors made an agreement with the United States of America, which agreement was ratified March 2, 1895 (28 Stat. 876) and by said agreement they did cede certain lands to the United States of America described as follows:

> "Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40' west longitude, thence on said line of 98° 40' due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning."

XXVII

Your Petitioners and Intervenors further state that the Choctaw and Chickasaw Nations of Indians claimed the right for compensation to the area of land ceded to the United States as set out in the preceding paragraph consisting of 743,257 acres of land and by the Act of

March 2, 1895 (28 Stat. 876 at 898), Congress conferred jurisdiction upon the Court of Claims to determine the rights, legal and equitable, of the Choctaw and Chickasaw Nations, the United States, and the Wichita and affiliated bands of Indians to the premises in question and an action was filed pursuant to the said Jurisdictional Act by the Choctaw and Chickasaw Nations against the United States and the Wichita and affiliated bands of Indians and a decision was rendered by the said Court of Claims on January 9, 1899 (34 Ct. of Cls. 17).

XXVIII

Your Petitioners and Intervenors further state that by the said decision of the Court of Claims (34 Ct. of Cls. 17), the Court of Claims decided that the claims of the Wichita Indian Tribe and its affiliated bands were without merit in so far as aboriginal title by said Indians to Southwestern Oklahoma and Northern Texas was concerned, and therefore the Court of Claims decided against the validity of the claims for aboriginal title to said area by the Wichita Indian Tribe and its affiliated bands. On appeal to the United States Supreme Court, Choctaw Nation vs. United States, 179 U.S. 494, the United States Supreme Court held that the Jurisdictional Act (28 Stat. 898) did not permit the presentation of the claim of the Wichita Indian Tribe and its affiliated bands for aboriginal title to the area of lands West of the Cross Timbers near the 98th Meridian between the Canadian River and the Red

River and the 100th Meridian on the West. The United States Supreme Court did hold that the Wichita Indians and its affiliated bands were entitled to the proceeds to be received from the sale of the said lands ceded to the United States by the agreement of June 4, 1891, and that the Choctaw and Chickasaw Nations had ceded their interest and title in the said lands to the United States by the Treaty of April 28, 1866 (14 Stat. 769).

XXIX

Your Petitioners and Intervenors further state that although the Court of Claims attempted to take jurisdiction and render a decision relative to the claims of the Wichita Indian Tribe and its affiliated bands for aboriginal title to the lands in Southwestern Oklahoma and Northern Texas, as aforestated, the United States Supreme Court on appeal held that no legal action was authorized by Congress to determine the validity of the claims of the Wichita Indian Tribe and its affiliated bands to the lands in Southwestern Oklahoma and the only jurisdiction granted by the Jurisdictional Act of March 2, 1895 (28 Stat. 876) was jurisdiction to determine the validity of the claim of the Choctaw and Chickasaw Nations and the Wichita Indian Tribe and its affiliated bands for the proceeds to be received from the sale of the particular lands in dispute; being a tract of land containing 743,257 acres, as heretofore set out. Your Petitioners and Intervenors further state that even though the Court

of Claims attempted to discredit the validity of the claims of the Wichita Indian Tribe and its affiliated bands for aboriginal title to Southwestern Oklahoma and parts of Texas and a long dissertation is contained in the opinion of the Court of Claims (34 Ct. of Cls. 17) stating the reasons for denying the validity of said claims, the United States Supreme Court on appeal Choctaw Nation vs. United States, 179 U.S. 494, held that there was no jurisdiction for the Court of Claims to make any decisions or findings relative to the title to the area of land outside of or beyond the 743,257 acre tract of land which was ceded to the United States by the Wichita Indian Tribe as aforestated, and for which tract of land the Choctaw and Chickasaw Nations were also claiming. Consequently, any statements in the opinion of the Court of Claims (34 Ct. of Cls. 17) as to the validity of the aboriginal title of the Wichita Indian Tribe and its affiliated bands to any areas of land besides the 743,257 acre tract are merely ex parte and the opinion of the Court of Claims (34 Ct. of Cls. 17) is not res judicata collateral estoppel does not apply against the Wichita Indian Tribe and its affiliated bands, Creek Nation vs. United States, 168 Ct. Cls. 483 (1964).

XXX

Your Petitioners and Intervenors further state that for many years after the United States Supreme Court decision was rendered in 1900, Choctaw Nation vs.

United States, 179 U.S. 494, your Petitioners and Intervenors attempted to get legislation through Congress allowing them to bring a suit against the United States for the wrongful taking of their lands for which lands their aboriginal title had not been extinguished and as heretofore set out (see paragraph VI herein), Congress passed the Jurisdictional Act of June 4, 1924 (43 Stat. 366). Pursuant to said Jurisdictional Act, the Wichita Indian Tribe and its affiliated bands and groups filed their claims against the United States in the Court of Claims for the wrongful taking of their lands in Southwestern Oklahoma and Northern Texas for lands which they claimed they were possessed with a valid aboriginal title. Their claims were again repulsed because the Court of Claims again held (89 Ct. Cls. 378) that the Jurisdictional Act of June 4, 1924 (43 Stat. 366) did not give the Court of Claims jurisdiction to determine the validity of the claims of the Wichita Indian Tribe of Oklahoma and its affiliated bands for aboriginal title to Southwestern Oklahoma and Northern Texas as has been more fully heretofore set out in this Complaint and Petition as paragraphs VI, VII, VIII, and IX.

XXXI

Your Petitioners and Intervenors further state that a casual examination of the decision of the Court of Claims in 1939 (89 Ct. Cls. 378) might be misleading in that it might appear that the Court of Claims had made a valid finding

and determination that the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups had never possessed a valid aboriginal title to lands in Southwestern Oklahoma. This was not the holding of the Court of Claims and a careful examination of said opinion will reveal that the Court of Claims held that the jurisdictional act did not by its terms allow, permit, or give jurisdiction to the Court of Claims to determine the validity of the claims of the Wichita Indian Tribe and its affiliated bands for title to lands based solely upon aboriginal occupancy and this determination can be found at the middle of Page 416 as follows:

> "It seems clear, therefore, that unless some other treaty, agreement, or act of Congress subsequent to the Quapaw treaty has recognized or conceded possessory and occupancy title to the territory involved as being in the Wichita and affiliated bands, the Jurisdictional Act is not sufficiently broad in its terms to confer jurisdiction upon this Court to award compensation to plaintiffs for this vast territory upon the basis of immemorial possession." (underscore added.)

XXXII

Your Petitioners and Intervenors further state that in the syllabus on the proofs of the Court of Claims opinion in 1939, at Page 378 in said opinion, there appears the following:

"Indian claims: aboriginal occupancy.- A claim based solely upon aboriginal occupancy is not within the terms of the Jurisdictional Act."

XXXIII

Your Petitioners and Intervenors further state that a detailed study of the said Opinion of the Court of Claims in 1939, supra, will reveal that the Court of Claims held that the Treaty of August 24, 1835, (7 Stat. 474) and the Treaty of May 15, 1846 (9 Stat. 844) were not sufficient to establish a treaty title to the lands claimed by the Wichita Indian Tribe and its affiliated bands, which treaties are more fully discussed in said 1939 opinion of the Court of Claims. The said 1939 opinion of the Court of Claims also held that aboriginal title of the lands in Southwestern Oklahoma had been extinguished by the Quapaw Treaty between the Quapaw Indian Tribe and the United States (7 Stat. 176) and without express authority from Congress for authority otherwise, the Court of Claims was bound to recognize the Quapaw Treaty as lawfully made and as the Supreme law of the land.

XXXIV

Your Petitioners and Intervenors further state that the Court of Claims in its 1939 opinion supra made a statement (perhaps dictum) that assuming the Jurisdictional Act of June 4, 1924 (43 Stat. 366) authorized the Court of Claims to allow or determine a claim based on immemorial possession or aboriginal title

if supported by sufficient evidence, the Court in 1939 stated that the evidence was not sufficient and such a claim could not be allowed even if the Court had had jurisdiction. The Court of Claims in its 1939 decision cited a considerable portion of the opinion of the Court of Claims rendered in 1899 (34 Ct. Cls. 17) wherein the Court of Claims in 1899 had stated that the Wichita Indian Tribe and its affiliated bands and groups did not prove aboriginal title to the lands claimed, which determination was invalid as later determined by the United States Supreme Court because on appeal, the United States Supreme Court held (179 U.S. 494) that the Court of Claims in 1899 had no jurisdiction to make any determinations about aboriginal title for the areas of land claimed by the Wichita Indian Tribe and its affiliated bands and groups. The Court of Claims in 1939 cited a considerable portion of the decision of the Court of Claims rendered approximately 40 years prior to that time (34 Ct. Cls. 17), and the Court of Claims in 1939 stated that the evidence presented to the Court of Claims in 1939 relative to aboriginal title of the Wichita Indian Tribe and its affiliated bands and groups was for the most part the same evidence and information presented to the Court of Claims in the earlier case in 1899 (34 Ct. Cls. 17). Of course, all of these statements by the Court of Claims in its 1939 decision were ex parte and obiter dictum and were of no judicial force or effect because the Court of Claims in its decision in 1939 had held that the Jurisdictional Act of June 4, 1924 (43 Stat. 366) gave no jurisdiction to

the Court of Claims to determine title based solely on aboriginal title by immemorial possession.

XXXV

Your Petitioners and Intervenors further state that in the decision of the Court of Claims rendered in 1939, supra, the Court of Claims held that the United States was under no liability for loss of lands and personal property within the State of Texas that were wrongfully taken from the Wichita Indian Tribe and its affiliated bands, and the Court of Claims implied that probably the said State of Texas was liable to the said Wichita Indian Tribe and its affiliated bands for their loss of the said real and personal property within the State of Texas.

XXXVI

Your Petitioners and Intervenors further state that the United States failed to protect the Wichita Indian Tribe and its affiliated bands in the possession of their property, both real and personal within the State of Texas and that the Wichita Indian Tribe and its affiliated bands were driven out of Texas in about the years of 1858 and 1859 and their real and personal properties within the State of Texas were wrongfully appropriated and taken by the State of Texas.

XXXVII

Your Petitioners and Intervenors further state that the Wichita Indian

Tribe and its affiliated bands and groups had signed a Treaty dated May 15, 1846, which Treaty was ratified on March 8, 1847 (9 Stat. 844) and which was a Treaty between the United States and various Texas Indian Tribes, including the Wichita Indian Tribe and its affiliated bands and groups. The said Treaty stated that the various Texas Indian Tribes, who executed the Treaty were lawfully and exclusively under the laws, jurisdiction, and Government of the United States of America and that the said Indian Tribes thereby submitted to the power and authority of the United States of America. The Wichita Indians and its affiliated bands and groups were entitled to the protection of the United States of America and the Federal Government from the compulsory acquisition of the property of the said Indian Tribes and groups by or through the actions of the United States of America, and as heretofore set out, the United States of America failed in its duty to protect the property of the Wichita Indians and its affiliated bands within the State of Texas (Lipan Apache Tribe vs. United States, 180 Ct. Cls. 487) and is therefore liable for the losses sustained by the said Wichita Indian Tribe and its affiliated bands and groups for the pecuniary loss they sustained by the failure of the United States to protect the said property located within the State of Texas of the said Indian Tribes and groups and as a result of said failure, the Wichita Indian Tribe and its affiliated bands lost approximately seven million acres of land for which they had aboriginal title and personal property, including

livestock, of the value of two hundred thousand dollars.

XXXVIII

Your Petitioners and Intervenors further state that this Commission has jurisdiction to make an award in connection with the claims of the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups for the wrongful taking of their lands and personal properties for which they had aboriginal title or absolute title under clauses 2,3,4, and 5 of Section 2 of the Act of August 13, 1946 (60 Stat. 1049, 1055) (Otoe & Missouria Tribe vs. United States, 131 F. Supp. 265, 131 Ct. Cls. 593).

XXXIX

Your Petitioners and Intervenors further state that even though the Court of Claims in its 1899 decision (34 Ct. Cls. 17) attempted to adjudicate the validity of the claims for aboriginal title by the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups to lands in Southwestern Oklahoma and in the said decision of the Court of Claims, the Court of Claims held generally against the validity of the said claims and even though the United States Supreme Court on appeal held that the Court of Claims in 1899 did not have jurisdiction to make any determination for or against the validity of the claimed aboriginal title to the said area claimed

(179 U.S. 494) and even though the Court of Claims again in 1939 (89 Ct. Cls. 378) stated that it did not have jurisdiction under the Jurisdictional Act under which the claim was filed to determine the validity of the claims of the Wichita Indian Tribe of Oklahoma and its affiliated bands for title based on aboriginal possession to lands in Southwestern Oklahoma and parts of Texas, and even though the Court of Claims in 1939 did make an obiter dictum statement about the non-validity of the claims of the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups for lands in Southwestern Oklahoma and parts of Texas, the said obiter dictum statement of the Court of Claims would not apply at the present time due to new evidence now available and sufficient to prove the said claims of the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups as hereinafter set out.

XL

Your Petitioners and Intervenors further state that the National Science Foundation made a substantial grant in the amount of $25,000.00 for a Pilot Study of Archeology and Ethnohistory of the Wichita Indian Tribe and that in 1965 pursuant to the funds furnished by the National Science Foundation, several archeologist drew up plans for a one year Pilot Study and they made their report based on the Pilot Study, which Pilot Study was designed to:

"a) obtain a body of field data from the components of the Spanish

Fort sites, the largest and best-documented of the historic Wichita sites in the Red River area;
b) make test excavations at several other sites in order that a problem-oriented program of future research can be accurately planned;
c) attempt to locate, by field reconnaissance, sites that relate to the Wichita occupation of the southern plains on both the historic and prehistoric time levels;
d) make a survey of available ethnohistorical data in order (1) to compile a bibliography of documentary materials relevant to Wichita ethnohistory, (2) to make a detailed study of documents that relate specifically to the excavations being carried out at Spanish Fort and at the sites being tested, (3) to seek information that might lead to the field locations of other Wichita sites, and (4) to appraise those sources best suited for more extended examination.

The co-investigators of the project were Tyler Bastian of the Museum of the Great Plains, Robert E. Bell of the University of Oklahoma, Edward B. Jelks of Southern Methodist University, and W. W. Newcomb of the Texas Memorial Museum at the University of Texas. Bastian supervised the archeological field work in Oklahoma under the direction of Bell. Jelks directed the archeological work in Texas.

Newcomb directed the ethnohistorical research. Marvin E. Tong of the Museum of the Great Plains served the project as general coordinator.

The main part of the ethnohistorical study consisted of a thorough search of the archives at The University of Texas for documents relating to Wichita ethnohistory. The archeological work included extensive excavations at the Longest Site in Oklahoma and at the Upper Tucker and Coyote Sites in Texas. More limited excavations were carried out at the Glass and Gas Plant Sites in Texas. Several other archeological sites were visited but not excavated beyond a test pit or two: the Devils Canyon and Wilson Springs Sites in Oklahoma, and the Gilbert, Stone, Vinson, and Womack Sites in Texas. An effort was also made to locate several sites in Oklahoma and Texas which were reported in historical documents but which had not been located in the field."

XLI

Your Petitioners and Intervenors further state that a report of the Pilot Study issued in August, 1967, which report consists of approximately 450 pages of material and exhibits and although it is impossible to recite the details of the said final report in this Petition, your Petitioners and Intervenors plan to introduce the said report as evidence when and if they are allowed to intervene in this action.

XLII

Your Petitioners and Intervenors further state that Omer Luellen, the Attorney for your Petitioners and Intervenors, has contacted various parties connected with the said Pilot Study and your Petitioners and Intervenors wish to call to the attention of this Commission, a letter received from Marvin E. Tong, by Omer Luellen, the Attorney for your Petitioners and Intervenors; the said Marvin E. Tong at that time was the Director of the Museum of the Great Plains at Lawton, Oklahoma, and served the project for the said Pilot Study as general coordinator, which letter is found in the Brochure Brief for the benefit of the Wichita Indian Tribe of Oklahoma, dated May, 1969, at Page XVII in the Appendix and the concluding paragraph of said letter is as follows:

> "However, I do not think you will have any difficulty establishing the Wichitas' aboriginal rights to all of the land from the Kansas border to a point in central Texas along a line about the 98th meridian. I believe any knowledgeable anthropologist in the country will support you on this claim. The occupation from aboriginal times until the mid-1800's of the Wichita and related tribes has always been in this area. Archaeological evidence is increasingly indicating the same knowledge of Wichita occupation of the area in question."

XLIII

Your Petitioners and Intervenors further state that Omer Luellen, the Attorney for your Petitioners and Intervenors, has also been in communication with W. W. Newcomb, Director of the Texas Memorial Museum located at The University of Texas at Austin, Austin, Texas, who directed the ethnohistorical research for the said Pilot Study and a letter addressed to Omer Luellen from the said Dr. W. W. Newcomb is found in the Brochure Brief for the benefit of the Wichita Indian Tribe of Oklahoma, dated May, 1969, and at Pages XVIII and XIX in the Appendix a portion of the said letter is as follows:

> "This letter is written as a result of our conversation in my office April 17, 1969, concerning the claim of the Wichita Indian Tribe of Oklahoma against the United States to aboriginal title to that portion of Oklahoma west of the Cross Timbers between the Canadian River and the Red River. As a result of my study of the ethnohistory of this tribe, I am of the opinion that this is a valid claim.
>
> * * * *
>
> Throughout their history the Wichitas were a gardening and hunting people, living in villages during part of the year, following the chase and living in tipis the remainder. Being a prominent tribe

in the southern plains, the Wichitas became well known to the Spanish, French, and Americans, and the resulting records which pertain to their territory, movements, history, and nature are relatively full. During the early years of the nineteenth century, for example, the record of the Wichita's habitation of the land they are claiming in southwestern Oklahoma is varied and plentiful. The Dragoon Expedition, led by Colonel Dodge in 1834, from Fort Gibson to a Wichita village in Devil's canyon, near modern Lugert, Oklahoma, serves as a good example. There is an official journal, written by Thompson B. Wheelock, which described and locates the village. George Catlin, the artist, also accompanied the expedition, and he not only described the village but drew a picture of it. The same sort of information is available for other years and other villages. In short, the documentation is persuasive for the present Wichita claim."

XLIV

Your Petitioners and Intervenors further state that their Attorney, Omer Luellen, has contacted Professor Dr. Robert E. Bell of the University of Oklahoma, who participated in the Archeology Report of the said Pilot Study and Dr. Robert E. Bell assured the Wichita Indian Tribe of Oklahoma and its

affiliated bands and groups that his testimony will be available when and if needed, which testimony will verify that the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups were the original Indians in Southwestern Oklahoma and parts of Texas and possibly parts of Kansas and that their claim to aboriginal title to said area is a valid claim and your Petitioners and Intervenors presume that this Commission is cognizant of the fact that Dr. Robert E. Bell is the head of the Department of Anthropology at the University of Oklahoma.

XLV

Your Petitioners and Intervenors further state that in the said Pilot Study, there appears at the bottom of Page 35 and the top of Page 36 a statement by Dessamae Lorrain, Research Archeologist at Southern Methodist University, Dallas, Texas, who supervised certain excavations relative to the said Pilot Study, which quote is as follows:

> "As Pillaert pointed out (1963: 45) and Wedel recently affirmed (talk given at 1967 annual meeting of the Society for American Archeology), the Little River Focus of Kansas, the Washita River Focus of Oklahoma, and the Henrietta Focus of Texas are so similar that they could be attributed to a single ethnic group. Wedel reported recent finds of several artifact types in Kansas which had been found in Washita River Focus sites but had not previously been found in Little

River Focus sites. I suggest that these foci represent prehistoric Wichita who were living in a great strip of land in the Redbed Plains (Fenneman, 1938: Plate VI) between the hilly forested country to the east and the short-grass plains to the west from north-central Texas, through Oklahoma, to central Kansas. This country is rolling prairie grasslands with wooded river valleys. It provided all of the natural resources necessary for the maintenancy of the Wichita way of life."

XLVI

Your Petitioners and Intervenors further state that further additional evidence now available can be found in the book "Indians of the Plains" by Robert H. Lowie, Professor of Anthropology, University of California, published in 1954 for The American Museum of Natural History which at Page 8 contains a map showing the location of the aboriginal Indian tribes in the Plains area and the said map shows that the Wichita Indian Tribe was the aboriginal Indian Tribe for all of Oklahoma, except the panhandle portion of same.

(MAP OMITTED)

XLVII

Your Petitioners and Intervenors believe that this Commission will ascertain from the excerpts of proofs concerning their claims for aboriginal

title as heretofore set out, that the feasibility of their ability to make valid proofs of their claims without undue difficulty can be ascertained if your Petitioners and Intervenors are allowed to intervene in the present cause of action and if your Petitioners and Intervenors are not allowed to intervene herein, an invalid judgment may be rendered against the United States of America and in favor of the original Petitioners herein for aboriginal title to the same identical area claimed by your Petitioners and Intervenors herein.

XLVIII

Your Petitioners and Intervenors further state that if this Honorable Commission should decide that this Petition in Intervention should not be granted in Docket No. 257, that in the alternative this Petition be allowed to be filed as an original Petition because limitations should not bar the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups from having their day in Court for aboriginal title to the area claimed under the authorities heretofore set out in paragraph XXIII of this Complaint and Petition and in particular the authority found in The Yankton Sioux Tribe of Indians vs. United States, Opinion of the Indian Claims Commission, Docket No. 332 C issued on December 17, 1969, 22 Ind. Cl. Comm. 344.

WHEREFORE, YOUR PETITIONERS AND INTERVENORS PRAY:

(1) That they be allowed to intervene in Docket No. 257 pending before the Indian Claims Commission and as a last alternative, this Complaint and Petition be permitted to stand as an original Petition and a new cause of action be docketed before the Indian Claims Commission without the defense of limitations.

(2) That your Petitioners and Intervenors receive a judgment and award for the value of their lands to which they had aboriginal title located within the present State of Oklahoma at the time the lands were wrongfully taken from your Petitioners and Intervenors by the United States of America.

(3) That your Petitioners and Intervenors receive a judgment and award for the value of their lands and personal property to which lands they had aboriginal title and to which personal property they had absolute title located within the present State of Texas at the time the said lands and personal properties were wrongfully taken from your Petitioners and Intervenors, which wrongful taking was occasioned by the failure of the United States of America to intervene and protect the lands and personal properties of your Petitioners and Intervenors located within the present State of Texas at the time the said properties were wrongfully taken from your Petitioners and Intervenors herein.

(4) For all other relief proper in the premises, including the relief permissible in law and equity.

s/s Omer Luellen
Omer Luellen
P.O. Box 96
First State Bank Building
Hinton, Oklahoma 73047
Attorney for the Wichita
Indian Tribe of Oklahoma
and Bands and Groups of
Indians which have been
or which are affiliated
with the Wichita Indian
Tribe of Oklahoma,
including but not limited
to the Wichita, Wacos,
Keechis, and Towaconies.

OF COUNSEL:

PAUL M. NIEBELL
Attorney at Law
1026 17th Street N.W.
Suite 600
Washington, D.C. 20036

EXPLANATORY NOTES EXPLAINING THE APPENDICES OF BROCHURE BRIEF, WHICH BRIEF WAS EXHIBIT "A" TO PETITION OF WICHITA'S FOR INTERVENTION AND COPIES OF LETTERS FOLLOW

Note 3: Appendix No. VIII is a letter dated March 7, 1951, addressed to Frank Miller, at that time Chairman of the Wichita Indian Tribe, from the Chicago Law Firm of Adams, Moses & Culver. The date of the said letter shows that the time in question was shortly prior to the running of the Statutes of Limitations for filing claims against the United States of America by an Indian Tribe before the Indian Claims Commission. Proposed employment is refused by the said Law Firm because, in their opinion, the decision of the Court of Claims under the Jurisdictional Act of 1924 was Res judicata and therefore this Law Firm was of the opinion that it would be useless for the Wichita Indian Tribe to refile an action against the United States of America before the Indian Claims Commission.

Note 4: Appendix No. IX is a letter dated March 27, 1951, addressed to Frank Miller, at that time Chairman of the Wichita Indian Tribe, from the Detroit Law Firm of Dykema, Jones & Wheat. The date of the said letter shows that the time in question was shortly prior to the running of the Statutes of Limitations for filing claims against the United States of America by an Indian Tribe before the Indian Claims Commission. This particular Law Firm refuses employment because they stated that the expense involved prohibited them from representing additional Indian Tribes, but they further

stated that they were sending the letter of Frank Miller to the Washington Research Office (which was an office, apparently, set up by various Law Firms for research on Indian Claims Cases) and if any of the firms involved in the Washington project were interested they would communicate directly with Mr. Frank Miller, Chairman of the Wichita Indian Tribe. Patently, this group of Law Firms was not interested in representing the Wichita Indian Tribe and further correspondence hereinafter set out in this Appendix further verifies this fact.

Note 5: Appendix No. X is a letter dated March 7, 1951, addressed to Frank Miller, at that time Chairman of the Wichita Indian Tribe, from the Chicago Law Firm of Sonnenschein Berkson Lautmann Levinson & Morse. The date of the said letter shows that the time in question was shortly prior to the running of the Statutes of Limitations for filing claims against the United States of America by an Indian Tribe before the Indian Claims Commission. The import of the letter to Mr. Miller from this very proficient and unusually large firm of lawyers was that they were sending the letter to Mr. Felix Cohen, who had a Washington research office for Sonnenschein Berkson Lautmann Levinson & Morse Law Firm together with other Law Firms and that after receiving a reply from him they would in turn communicate again with Mr. Miller, which communication, of course, is the next letter set out in this Appendix.

Note 6: Appendix No. XI is a letter dated June 29, 1951, addressed to Frank Miller, at that time Chairman of the Wichita Indian Tribe, from the Chicago Law Firm of Sonnenschein Berkson Lautmann Levinson & Morse. The date of the said letter shows that the time in question was shortly prior to the running of the Statutes of Limitations for filing claims against the United States of America by an Indian Tribe before the Indian Claims Commission. In this letter Mr. Miller is given a definite answer that the Law Firm in question cannot and will not represent the Wichita Indian Tribe and this letter also stated that none of the firms associated with the Sonnenschein Berkson Lautmann Levinson & Morse Law Firm will represent the Wichita Indian Tribe. Omer Luellen, the present Claims Attorney for the Wichita Indian Tribe, does not know exactly how many Law Firms were associated in the Washington Research Office for Indian Claims, which Research Office was directed by Mr. Felix Cohen at the time in question which Research Office was for the benefit of various Law Firms that were representing various Indian Tribes before the Indian Claims Commission, but he has been informed that many leading Law Firms were participating in the Washington Research Office under the direction of Mr. Felix Cohen. As most knowledgeable persons know, Mr. Felix Cohen was associated with the Solicitors Office of the Department of the Interior for many years and he specialized in Indian legal matters while with the Solicitors Office. After concluding his Government career, Mr. Cohen became associated with the Law

Firm of Strasser, Spiegelberg, Fried, Frank & Kampelman of New York City, New York, with a Washington, D.C. office located at 1700 K Street N.W., but the brilliant career of Mr. Cohen was struck short several years ago by the grim reaper.

Note 7: Appendix No. XII is an undated letter from W. C. Lewis carrying the address of 820 Hightower Building, Oklahoma City, Oklahoma, to Frank Miller, at that time Chairman of the Wichita Indian Tribe, which letter was probably written sometime in 1950, at least considerably prior to January 9, 1951. Mr. Lewis stated in the letter in question to Mr. Miller that Mr. Lewis and his associate, Mr. Roy Thompson, had practically concluded that the Wichitas did not have a good case for filing before the Indian Claims Commission because the Court of Claims held against the Wichita Indians in the decision rendered by the Court of Claims in 1939. Mr. Lewis assured Mr. Miller that he would further communicate with him and in Appendix No. XIII as described in Note 8 we have the conclusion of the said correspondence between Mr. Lewis and Mr. Miller.

Note 8: Appendix No. XIII is a letter dated January 9th, 1951, addressed to Frank Miller, then Chairman of the Wichita Indian Tribe, which letter was written from the Law Offices of a group of Attorneys in Washington, D.C., including J. Roy Thompson, Jr. In the letter under consideration, Mr. W. C. Lewis definitely stated to Mr. Miller that J. Roy Thompson, Jr. and W. C. Lewis had concluded and it was

their opinion that the chances for recovery of the Wichita Indian Tribe of any claims against the United States of America would be very negligible and they did not desire employment on a contingent basis and refused employment accordingly. (Undoubtedly this decision to refuse employment was based upon the premise that the old case before the Court of Claims was Res judicata for a new case against the United States of America before the Indian Claims Commission by the Wichita Indian Tribe).

Note 9: Appendix No. XIV is a letter dated March 8, 1951, addressed to Frank Miller, then Chairman of the Wichita Indian Tribe, from the Newark Law Firm of McCarter, English & Studer. The date of the said letter shows that the time in question was shortly prior to the running of the Statutes of Limitations for filing claims against the United States of America by an Indian Tribe before the Indian Claims Commission. This prominent Law Firm of Attorneys is still a very active Law Firm in Newark, New Jersey, and the firm refused employment because they stated that the great volume of work made it impossible to represent additional Indian Tribes because they were at that time representing two other Indian Tribes and apparently the Res judicata phase was in the background of their decision to refuse employment.

Note 10: At Appendix Nos. XV and XVI there appears a letter dated March 24, 1969, from Lyle R. Griffis, Field Solicitor for the United States Department of the

Interior at Anadarko, Oklahoma, addressed to Omer Luellen, present Claims Attorney for the Wichita Indian Tribe. This letter gives further details of the circumstances surrounding the attempts by Mr. Frank Miller, the Chairman of the Wichita Indian Tribe in 1950 and 1951 to secure legal counsel to represent the said Tribe in question before the Indian Claims Commission prior to the lapsing of time to file said claims. The information in this letter is definite proof that the Wichita Indian Tribe made every effort possible to secure legal counsel for the filing of their claims against the United States of America in the Indian Claims Commission and before the running of the Statutes of Limitations and that even with the expert guidance of Mr. Griffis the efforts to secure legal counsel for the Wichita Indian Tribe was of no avail before the running of the Statutes of Limitations on August 13, 1951.

52 g

LAW OFFICES

ADAMS MOSES & CULVER
231 South LaSalle Street
Chicago

4

March 7, 1951

Mr. Frank Miller,
Chairman Wichita Tribal Council
Gracemont, Oklahoma

Dear Mr. Miller:

I received your letter of March 6th regarding the claim of the Wichita Tribe against the government, and assume that you wrote to me because you knew that I represent the Citizen Band of Potawatomi Indians of Oklahoma.

From the information contained in your letter, I assume that your tribe has exhausted its remedy against the government by virtue of the claim filed in the Court of Claims under the jurisdictional Act of Congress passed in 1924.

It is my opinion that you would have no right to file a claim in the Court of Claims covering those matters which were heard by the Court of Claims as the Indian Claims Commission has in similar cases ruled that such claims should be dismissed on the ground res judicata, which means that the same matters between the same

parties have been adjudged and determined. In effect, you have had your day in court and your claim has been decided.

It is unfortunate that the decision of the Court of Claims was adverse to your interest. I doubt very much if I could be of any service to you in this matter.

Yours very truly,

HDM:eha

s/s Howard D. Moses

LAW OFFICES

DYKEMA, JONES & WHEAT
2746 Penobscot Building
DETROIT 26

March 27, 1951

Mr. Frank Miller, Chairman,
Wichita Tribal Council,
Gracemont, Oklahoma

Dear Mr. Miller:

Upon my return from a short vacation I have examined your letter of March 12th and the letter of Mr. Gault of this office to you under date of March 15.

Mr. Gault's statement to you is correct, that this firm has definitely decided not to take any more Indian claims, inasmuch as they involve too much time and expense for possible returns. I doubt whether anyone realizes the vast amount of time and the great amount of cash outlay which are involved in properly preparing an Indian claim for presentation to the Commission.

As you may know we are one of a group of attorneys who have joined into what is known as a Joint Efforts Agreement with respect to Indian claims, and have maintained a Washington Research office. We have taken the liberty of sending your letter on to the Washington office for further consideration and in the event

any one of the firms involved are willing to consider your claim they will communicate with you directly.

We appreciate your interest in communicating with us and sincerely hope that your group will be properly represented.

Very truly yours,

DYKEMA, JONES & WHEAT

s/s Elroy O. Jones

EOH*mmc

SONNENSCHEIN BERKSON LAUTMANN LEVINSON &
MORSE

77 West Washington Street
CHICAGO 2

Telephone ANdover 3-6400

March 7, 1951.

Mr. Frank Miller,
Route 2,
Gracemont, Oklahoma.

Dear Mr. Miller:

I have your letter of March 3rd. My firm, together with others, has a Washington research office which is in charge of Mr. Felix Cohen. I have referred your letter to that office and have asked them to consider the questions presented by your letter. As soon as I have had a communication from them, I will write you again.

As a matter of curiosity, please tell me the source from which you obtained the name of my firm.

Very truly yours,

SONNENSCHEIN BERKSON LAUTMANN
LEVINSON & MORSE

EPM:FM

BY S/S Edward P. Morse

57 g

SONNENSCHEIN BERKSON LAUTMANN LEVINSON & MORSE

77 West Washington Street
CHICAGO 2

Telephone ANdover 3-6400

June 29, 1951

Mr. Frank Miller
Gracemont
Oklahoma

Dear Mr. Miller:

The matter of the Wichita Tribal Council, which you mentioned in your letter to my firm, has been considered, and I regret to advise you that neither my firm nor any of the firms with whom we are associated feel that we can undertake to represent the Wichita Tribal Council at this time.

Yours very truly,

SONNENSCHEIN BERKSON LAUTMANN LEVINSON & MORSE

By
s/s Edw. P. Morse

EDM:mrl

LAW OFFICES
OF
LEWIS & LEWIS
1424 K Street, N.W.
Washington 5, D.C.

National 6298

820 Hightower Bldg.,
Oklahoma City, Okla.

Mr. Frank Miller,
Chairman Tribal Council of Wichitas,
Gracemont, Okla.

Dear Mr. Miller:

Inasmuch as I have been in the State of Maine for three months on account of the serious illness of my wife, who suffered a heart attack, this is the first opportunity I have had to answer your letters.

Some months ago, I asked my law associate in Washington, Hon. Roy Thompson, who is with me in the Kiowa case, to also check your matter. In preparing the briefs in the Kiowa, etc. case now pending in the Indian Claims Commission, we had occasion to find the law relative to the Wichitas. We had about concluded that inasmuch as the Court of Claims held against the Wichitas that the case could not now be again filed before the Indian Claims Commission. However, we are to argue the Kiowa case

before the Commission on the 14th of this month. I will confer with Mr. Thompson and notify you our decision the week end so that if we do not care to take the case you can employ other attorneys.

With best wishes, I am,

Sincerely,

s/s W. C. Lewis

W. C. Lewis.

LAW OFFICES OF

M. WALTON HENDRY
BERNARD J. GALLAGHER
J. ROY THOMPSON, JR.

Metropolitan 4367
Cable "Ostrow"

Union Trust Building
Washington 5, D.C.

January 9th, 1951.

Mr. Frank Miller,
Chairman, Wichita Tribe,
Gracemont, Okla.

Dear Mr. Miller:

Mr. Thompson, my associate here in Washington, and I have given considerable time to the consideration of the matter of the claim or claims of the Wichitas against the Government.

We are of the opinion that the chances of recovery for the Tribe are such that we do not care to accept employment on a contingent basis.

I thought I should give you this information at this time so that you may seek other attorneys if you desire.

Thanking you for your offer of the business, I am,

Sincerely,

s/s W. C. Lewis

W. C. Lewis.

McCARTER, ENGLISH & STUDER
COUNSELLORS AT LAW
RAYMOND COMMERCE BLDG.
11 Commerce St.
NEWARK 2, N. J.

March 8, 1951

Frank Miller, Chairman
Wichita Council
Gracemont, Oklahoma

Dear Mr. Miller:

We are in receipt of your letter of March 3, inquiring if our firm can represent your tribe in pressing claims before the Indian Claims Commission. Our firm is presently representing two other Indian Tribes before the Indian Claims Commission, and the volune of work is such that we are unable to represent an additional Tribe.

We trust that you will be able to find some other firm to represent you.

Very truly yours,

s/s McCarter, English, Studer

U:dp

McCarter, English & Studer

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
P.O. Box 397
Anadarko, Oklahoma 73005

March 24, 1969

Mr. Omer Luellen
Attorney at Law
P.O. Box 96
Hinton, Oklahoma 73047

Dear Mr. Luellen:

This is in response to your request that I provide you with such information as I may have concerning the efforts of the Wichita Indian Tribe in 1950 and 1951 to obtain legal counsel to represent it in asserting before the Indian Claims Commission such claims against the United States which it believed should be judicially considered. While the comments in that regard which are contained herein are principally based upon recollection, I can state that my recollection in that regard is rather clear, probably because of the numerous occasions upon which the tribal chairman at that time, Mr. Frank Miller, discussed the subject with me in my office.

My first interest in that subject was aroused when I discovered from a review of tribal claims attorney contract files maintained at the Anadarko Area Office that the Wichita Tribe was one of three tribes under the jurisdiction of the Area Office which had not at that time

employed counsel to assert claims which the Indian Claims Commission Act authorized Indian tribes to file with the Indian Claims Commission. I was at that time employed as an attorney-advisor with the Bureau of Indian Affairs and was assigned to the Anadarko Area Office. I wrote to Chairman Miller advising him of the deadline for filing tribal claims before the Commission and that I had noted that the Wichitas had not employed counsel for that purpose. Thereafter Mr. Miller made the first of a number of visits to my office to discuss the inability of the Wichita Tribe to obtain counsel.

I recall that at the time of his first visit Mr. Miller related that the Wichita Tribe had obtained, some years earlier, the enactment of a jurisdictional act under the authority of which the tribe had unsuccessfully asserted certain tribal claims before the U.S. Court of Claims. Mr. Miller informed me that attorneys and legal firms who had initially indicated an interest in representing the Wichitas in asserting their tribal claims had, without exception, declined to enter into a contractual relationship upon learning of the adverse Court of Claims decision, primarily upon the basis that the prior decision might amount to res judicata, the effect of which would prevent further judicial consideration of Wichita tribal claims. It is my recollection that Mr. Miller stated at that time that even Mr. James Curry, a Washington attorney who had entered into contracts with a considerable number of Indian tribes for the purpose of representing them in the

presentation of their tribal claims, had declined employment by the Wichita Tribe. During this period of time Mr. Miller was also in correspondence, so he advised me, with Mr. Roy St. Louis, a Washington attorney, in an effort to either obtain his representation or his advice as to other sources of representation.

I provided Mr. Miller with a list of the names and addresses of all attorneys and legal firms who had entered into claims contracts with Indian tribes under the jurisdiction of the Anadarko Area Office in order that he might contact them concerning either their representation or their suggestions as to another source of representation. On various occasions Mr. Miller showed me letters of reply which he had received, and without exception representation of the Wichita Tribe was declined. I recall distinctly that, as the deadline for the filing of claims before the Indian Claims Commission drew near, Mr. Miller sought more desperately to obtain legal representation, but without avail. As a result, the deadline date passed without the Wichita Tribe having filed any claims before the Commission or having engaged counsel to represent them in the assertion of such claims.

Sincerely yours,

s/s Lyle R. Griffis

Lyle R. Griffis
Field Solicitor, Anadarko

APPENDIX H

EXCERPTS FROM LEGISLATIVE HISTORY CONCERNING THE ACT PASSED IN 1967 EXTENDING THE INDIAN CLAIMS COMMISSION TO APRIL 10, 1972, WHICH LEGISLATIVE HISTORY IS FOUND IN TOTO IN U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, VOLUME I FOR THE 90th CONGRESS, FIRST SESSION, 1967 AT PAGES 1106 THROUGH 1120 INCLUSIVE.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., February 28, 1967.

Hon. WAYNE N. ASPINALL,
Chariman, Committee on Interior and
Insular Affairs,
House of Representatives,
Washington, D.C.

Dear Mr. Aspinall: This responds to your request for a report on H.R. 537, H.R. 2536, and H. R. 3944, all relating to the Indian Claims Commission.

1. We recommend the enactment of a bill that will extend the life of the Indian Claims Commission for an additional 5 years. Both H.R. 2536 and H.R. 3944 would accomplish this result. H.R. 537 would extend the life of the Commission for only an additional 2 years, which in our opinion is inadequate.

The life of the Indian Claims Commission will expire on April 10, 1967, unless new legislation is enacted. The Commission was established to provide a

forum for hearing and deciding all tribal claims against the United States that were in existence before 1946. Much time and money have been invested in the preparation and trial of those claims. It would be both wasteful and unfair to the Indian tribes to allow the Commission to expire before the process has been completed. The tribes are entitled to their day in court, and if they are not allowed to proceed before the Indian Claims Commission they will undoubtedly request the enactment of special jurisdictional acts, which is a practice Congress sought to avoid when it enacted the Indian Claims Commission Act.

In our opinion, it is highly desirable to extend the life of the Commission for a reasonable period, and the 5-year period provided in H.R. 2536 and H.R. 3944 seems reasonable to us.

* * * *

STANLEY A. CAIN,
Assistant Secretary of the Interior.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 1, 1967.

Hon. WAYNE N. ASPINALL,
Chairman, Committee on Interior
and Insular Affairs,
House of Representatives,
Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice on the Bills H.R. 537 and H.R. 2536, to terminate the Indian Claims Commission, and for other purposes.

* * * *

But it is quite obvious that the Commission cannot finally dispose of all of the pending cases between now and April 10, 1969.

Indian claims cases are unlike any other type of litigation with the possible exception of antitrust cases. The amount of research required is almost beyond belief to one not familiar with the problems involved.

Many of the cases involve the question of what lands the Indians actually used and occupied. This is a task of tremendous scope; and both sides normally employ anthropologists to make a complete and thorough study of the information available, including tradition, historical documentation and expert conclusions. In most instances long and detailed reports are prepared presenting the evidence

upon which the conclusions of the expert are based. Most of the witnesses are college professors, and the time which they can devote to this extracurricular activity is limited. Once they have testified, the lawyers must thoroughly set forth their respective contentions before the Commission in the form of requested findings and briefs. This takes an enormous amount of time, depending on the complexity of the case. The Commission must then consider the evidence and the briefs of the parties, write its own findings of fact (required by section 19 of the act (25 U.S.C. 70r) and its opinion. Either party may appeal from this determination.

* * * *

RAMSEY CLARK,
Acting Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA, ETC.,
Petitioners,

v.

THE UNITED STATES OF AMERICA, and
THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Claims

BRIEF FOR THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS IN OPPOSITION

J. ROY THOMPSON, JR.
400 Union Trust Building
Washington, D.C. 20005
Attorney for Respondents,
The Kiowa, Comanche and
Apache Tribes of Indians.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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60 Stat. 1049, 1051, 25 U.S.C. 70h 6
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60 Stat. 1049, 1054, 25 U.S.C. 70s(c) 4, 6
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MISCELLANEOUS AUTHORITIES

Federal Rules of Civil Procedure:

Rule 24(a) 2, 20
Rule 24(b) 20

Rules of the Supreme Court of the United States:

Rule 19 ..... 5, 7
Rule 23 15

Chief Justice Vinson, address before American Bar Association, September 7, 1949, 68 S.Ct. V, VI.... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA, ETC.,
Petitioners,

v.

THE UNITED STATES OF AMERICA, and
THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Claims properly held it would be an injustice to the respondent Tribes to allow petitioners to intervene in respondents' timely filed claims before the Indian Claims Commission, when petitioner Tribes sought intervention nearly 19 years after the statutory bar for presenting claims to that Commis-

sion, and when petitioners' claim is adverse to respondents' and may result in the defeat of respondents' claim, or any claim.

STATUTES INVOLVED

In addition to the provisions of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, set out in Petitioners' Appendix F, the provisions providing for appeal to the Court of Claims, for filing of claims before the Commission by tribal members, for notice to the tribes of the provisions of the Act, and for investigation of claims, set out in Appendix 1 hereof, are pertinent.

The quoted rules of the Court of Claims relating to intervention (Pet. 5-6) certainly, and the Federal Rules of Civil Procedure, probably, have no effect upon the question presented.[1]

STATEMENT OF THE CASE

On August 9, 1951, the Kiowa, Comanche and Apache Tribes, respondents, filed timely petition before the Indian Claims Commission (Docket No. 257). By statute, all such claims are barred after August 13, 1951, and no pre-existing claim "may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress," 60 Stat. 1049, 1052, 25 U.S.C. 70k.

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[1] It is not understood why petitioners quote Rule 24(a) of the Federal Rules of Civil Procedure involving Intervention of Right, when they interpret the case cited by the Commission to support intervention here, *Lipan Apache* v. *United States*, 22 Ind. Cl. Comm. 1 (1969), (Pet. App. 1d), as a case of "permissive" intervention. (Pet. 20)

Various steps were taken in prosecuting the claims of these Tribal respondents before the Commission, until on February 13, 1970, they had filed a motion, supported by exhibits and argument, for summary judgment of recognized title to an area of land specifically described in the Treaty of October 18, 1865, 14 Stat. 717. This motion was set for hearing on April 13, 1970, but petitioners, on March 16, 1970, filed a motion to be allowed to intervene in order to press a pre-existing claim. The hearing was postponed, and, on February 10, 1971, over objection of the United States and these respondents, intervention was allowed. Pet. App. C. At the argument on respondents' motion for summary judgment of recognized title finally held on June 24, 1971, intervenors took the position that respondents' contentions were not "right."

On August 9, 1971, the Indian Claims Commission in a four to one decision granted respondent Tribes' motion for summary judgment of recognized title and held that in further proceedings they would determine the claim of petitioners.[2] 26 Ind. Cl. Comm. 101.

On November 9, 1971, the United States appealed to the Court of Claims asserting, among other things, that the Commission erred 1) in holding in favor of these Tribal respondents on their motion for summary judgment of recognized title, and 2) in allowing petitioners' untimely intervention.

On June 20, 1973, the Court of Claims unanimously held that the petitioners had improperly been allowed

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[2] The petitioners are incorrect when they state (Pet. 13) that the Commission determined that the Wichita Tribe "in fact" had an interest in the lands which were held to be recognized.

to intervene, and, in a four to three decision, overruled the Commission's finding that the Treaty of October 18, 1865, (14 Stat. 717), granted recognized title, Appeal 12-71,—Ct. Cl.—479 F.2d 1369. The case was remanded to the Commission for a determination of respondents' alternative claim for aboriginal possession. Rehearings were denied by the Court of Claims. (Pet. App. B).

Petitioners' application for certiorari is directed only to the propriety of the disallowance of their intervention.[3]

The Court of Claims held that Wichita intervention was improperly allowed because 1) it was "filed with the Commission nearly twenty years after * * * [these respondents] filed their claim for relief" (Pet. App. 20a), and, consequently, their "claim has been forfeited by * * * failure to timely file with the Commission" (Pet. App. 21a), 2) the cases relied upon by petitioners[4] "do not show that a late intervenor may intervene in a claim where his interests are in direct conflict with those of the original claimant" (Pet. App. 21a), and 3) the late intervention "would work an injustice" as it might result in the defeat of respondents' timely filed claim, or "of any claim." (Pet. App. 22a).

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[3] These respondents did not appeal to the Court of Claims and have not filed a petition for a writ of certiorari directed to the denial of the claim for recognized title by the Court of Claims. No waiver of rights under 60 Stat. 1049, 1054, 25 U.S.C. 70s (b) and (c) should be inferred.

[4] *Blackfeet & Gros Ventre Tribes* v. *United States*, 162 Ct. Cl. 136 (1963), *Snoqualmie Tribe of Indians* v. *United States*, 173 Ct. Cl. 570, 372 F. 2d 951 (1967).

ARGUMENT

Respondent tribes will show that a writ of certiorari should not be granted as 1) there is presented no conflict of decisions, 2) there is no important question of federal law involved, and 3) the decision of the Court of Claims is correct. (Rule 19)

I. THIS CASE PRESENTS NO CONFLICT OF DECISIONS.

Petitioners do not claim a conflict of decisions. Indeed, there can be none as the Court of Claims is charged with "exclusive jurisdiction to affirm, modify, or set aside" the determination of the Commission (60 Stat. 1049, 1054, 25 U.S.C. 70s(b); App. 1). The Court of Claims, since 1946, has been so charged with exclusive appellate jurisdiction. There has been a total of forty-six [5] cases acted upon by this Court under its appellate jurisdiction and only in three cases [6] has certiorari been granted, and in only two cases [7] has this court reversed. As will be shown hereinafter, the Court of Claims decisions on intervention are consistent and well considered.

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED.

Petitioners argue that the grant of a writ of certiorari "is very important" to them. (Pet. 27). It

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[5] A complete listing of such applications for writs of certiorari and the actions of this Court thereon is set out in Appendix 2 hereof.

[6] *Creek Nation* v. *United States*, 370 U.S. 157, reh. denied, 371 U.S. 854 (1962); *Peoria Tribe of Indians of Oklahoma, et al.* v. *United States*, 390 U.S. 468 (1968); *United States* v. *Southern Ute Tribe or Band of Indians* 402 U.S. 159 (1971).

[7] *Peoria Tribe*, *supra*; *Southern Ute Tribe*, *supra*, which involved, respectively, the proper measure of damages, and the finality of a settlement, both subjects of paramount importance in the field.

may be assumed that every petitioner for a writ of certiorari believes that his case is important. This alone, however, is not grounds for granting the writ.[8]

Petitioners' only suggestion that any federal question is presented is an oblique reference to the fact that some tribes have and some have not, over the years, been allowed to intervene in actions before the Commission (Pet. 27-28), and that this Court should establish "definite guidelines for intervention in the Indian Claims Commission." (Pet. 18) There are two basic errors in this approach. First, Congress has given this rule-making power to the Commission,[9] subject only to the "exclusive jurisdiction" of the Court of Claims on appeal. Under the Act creating the Commission, this Court may only review "determinations of questions of law by the Court of Claims."[10] The Commission has been in existence since 1946, and has properly carried out this rule-making function, under the overall "exclusive" appellate jurisdiction of the Court of Claims, all as directed by Congress. Second, assuming, *arguendo*, power in this Court, it may be

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[8] See address of Chief Justice Vinson before the American Bar Association on September 7, 1949, where he said "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of the case." 69 S. Ct. V, VI.

[9] 60 Stat. 1049, 1051, 25 U.S.C. 70 h provides, "The Commission shall have power to establish its own rules of procedure."

[10] 60 Stat. 1049, 1054, 25 U.S.C. 70s(c). This statutory provision is a restriction upon this Court's general Court of Claims certiorari jurisdiction as set out in 62 Stat. 928, 28 U.S.C. 1255. *See United States* v. *Penn. Foundry & Mfg. Co.*, 337 U.S. 198, 207, n. 4, (1949). Cf. *United States* v. *Esnault-Pelterie*, 303 U.S. 26, 32 (1938).

questioned whether this Court should set out, as a matter of policy, to make rules or establish guidelines for all the multitude of federal agencies, tribunals, establishments, or commissions. There must be, after all, a limit to the ability of this Court to oversee all the minutiae of government.

Thus, there is no important federal question presented which should impel this Court, in the exercise of "sound judicial discretion," to grant this petition (Rule 19).

III. THE DECISION OF THE COURT OF CLAIMS IS CORRECT.

Petitioners state their application presents only "one principal issue which issue is whether it is correct or in error for the permitting of the Wichita Indian Tribe of Oklahoma to intervene in a pending timely filed claim approximately nineteen years after the normal running of the Statutes of Limitations * * *." (Pet. 16). Petitioners misinterpret the office of a writ of certiorari. It is not primarily to correct assumed errors in decisions of courts below.[11]

A. The Decision of the Court of Claims Is Correct.

Analysis of the decision by the Court of Claims in question shows that it is correct. The Court found the petition in intervention was "filed with the Commission nearly twenty years after * * * [respondent] Tribes filed their claim for relief" (Pet. App. 20a), and, consequently, their "claim has been forfeited by

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[11] Petitioners do not suggest that there has been such a departure from accepted and usual course of judicial proceedings as to call for this Court's power of supervision. (Rule 19.2). See footnote 8, *supra*.

* * * failure to timely file with the Commission" (Pet. App. 21a).

The Indian Claims Commission was set up under a special jurisdictional act in which Congress waived "any statute of limitations or laches" (60 Stat. 1049, 1050, 25 U.S.C. 70a, Pet. App. 2f). In return for such waiver, and as a part of the enabling statute, Congress provided a definite jurisdictional limitation for the filing of claims before the Commission it created to hear Indian claims. The statute provided.

> "The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. (60 Stat. 1049, 1052, 25 U.S.C. 70k).

Petitioners on March 16, 1970, sought to file, in essence, a new claim[12] before the Commission asserting independent claims against the United States. The petitioners sought to be declared the aboriginal owners of only a portion of the area claimed, alternatively, by these respondents,[13] and, in addition, claimed damages for loss of personal property in no way involved in

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[12] See Pet. App. 18, where the complaint in intervention is stated, alternatively, to be "An Original Petition," and 44g, where it is described as "a new cause of action."

[13] Petitioners sought by amendment to enlarge their aboriginal claim from 13,200,000 acres all within respondents' claim area, to 40,000,000 acres and then to 60,000,000 acres with the additional areas outside of respondents' claim area. The amendments related to claims largely not within the aboriginal claims of these respondents.

respondents' timely claim.[14] Congress had prescribed that such claims might not be presented after August 13, 1951. This is jurisdictional.[15] When Congress creates a new liability with specific provisions on the time within which such rights may be sought, compliance with such limitations are essential to the assertion of the liability. *United States ex rel. Texas P. Coal Co.* v. *McCord*, 223 U.S. 157, 162 (1914).

Petitioners freely admit that their claims are adverse to those of these respondents (See Question Presented, Pet. 3-4; last par., Pet. 23). The Court of Claims correctly analyzed the situation created by the almost 19 year delay by petitioners in presenting their claim, as follows:

> "The result we would reach if we adopted the intervenors reasoning would be to allow a party, too late to file his own claim, to obtain a hearing by appending his claim to that of another party, timely filed, whose claim he seeks to defeat. It is not a question of one or the other party getting an award admittedly due someone. The proofs adduced on behalf of the Wichitas could easily demonstrate that no one had exclusive control of the tract to which the Kiowas and their group claim aboriginal title, or of parts thereof. The Wichita Indian Tribe of Oklahoma and Affiliated Bands could have timely filed their claim with the Indian Claims Commission. They did not. It would work an injustice to allow them to join in a timely

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[14] The petitioners allege in their complaint in intervention a claim for $200,000 against the United States for alleged wrongful loss of livestock, which is unrelated in any way to these respondents' claim. See pars. XXXVI, XXXVII, and par. 3 of request for relief, Pet. App. 32g-34g, 44g.

[15] *United States* v. *Seminole Nation*, 299 U.S. 417 (1937).

filed suit by the Appellees when the result of that intervention may be the defeat of the Appellees claim, and of any claim." (Pet. App. 21a, 21b)

B. The Cases Relied Upon by Petitioners Do Not Support Late Intervention by One Claiming Adversely to the Timely Claimant.

The petitioners below urged the propriety of their intervention based upon the cases of *Blackfeet & Gros Ventre Tribes* v. *United States*, 162 Ct. Cl. 136 (1963), *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 372 F. 2d 951 (1967); and *Lipan Apache Tribe* v. *United States*, 22 Ind. Cl. Comm. 1 (1969) (Pet. App. 21a). Here, petitioners admit that their case "depends upon" the *Blackfeet* and *Snoqualmie* decisions. (Pet. 21)

The Court of Claims correctly analyzed its own *Blackfeet* and *Snoqualmie* decisions when it said that in those cases

> "we took pains to show that no intervenor was claiming adversely to the timely claimant. In both cases the litigations involved Treaties to which the intervenors were joint parties."[16]

Here, of course, petitioners' claims are adverse to Tribal respondents. (Pet. 3, 23)

In *Blackfeet*, supra, the Court of Claims passed upon the propriety of a late intervention by the Assiniboine Tribe which arose when the attorneys who were representing both Tribes determined that it could no longer represent the Assiniboines. The Blackfeet and Gros Ventres Tribes, the original timely claimants, "themselves originally moved to include the Assini-

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[16] — Ct. Cl. —, 479 F. 2d 1369, 1377 (1973), Pet. App. 21a. The analysis at pages 21 to 27 of the petition does not show the conclusion of the Court of Claims to be wrong. See pp. 15-21, *infra*.

joines as petitioners * * *."[17] Both tribes were signatories to the same Treaty from which it was claimed the rights of each identically arose. Their interests, if any, were mathematically proportional to their population. Under those facts, the Court of Claims held that the late intervenors "may have a common and undivided interest" with the original plaintiffs, and that the intervenors "are not asserting a new or separate claim which would be untimely under section 12 of the Act." 60 Stat. 1049, 1052, 25 U.S.C. 70k; 162 Ct. Cl. 136, at 144.

Here, intervenors admit, and the Court of Claims found, their claim is adverse to those tribes whose claims were timely. Here intervenors are asesrting a new and separate claim. It is of interest to note that Judges Durfee and Davis who sat on the Court of Claims in *Blackfeet* joined in the unanimous Court that decided intervention was not proper in the case at bar.

In addition to the bar of the statute of limitations, *Blackfeet* is authority that a late intervenor can also be barred by laches. 162 Ct. Cl. 136, at 138 and 143. Here, petitioners are guilty of laches in attempting to assert a claim in another suit nearly 19 years after the limitations period has expired. Although the Court of Claims below did not expressly invoke the doctrine of laches, the opinion shows, *a fortiori*, that this doctrine is applicable.

While *Snoqualmie*, 178 Ct. Cl. 570, 372 F. 2d 951 (1967), was admittedly[18] not an intervention case,

[17] 162 Ct. Cl. 136, at 139.

[18] The petitioners recognized that *Snoqualmie* "was not directly on intervention." (Pet. 26)

petitioners see an analogy. The question arose in that case when the attorney for the Snoqualmie Tribe concluded that the Skykomish Tribe was either a subgroup or became merged with the Snoqualmie. At trial he attempted to show this and to prove aboriginal title on the part of both Tribes. A motion to amend the petition to conform to the proof was originally allowed, but finally denied. The denial was based upon the premise that the Skykomish Tribe was a separate entity and, consequently, that the Commission lacked jurisdiction to entertain their claim as the proposed amendment to the petition was made after August 13, 1951, the cut-off date for presentation of claims to the Commission. The Court of Claims reversed and held that the Snoqualmie amendment should have been allowed because 1) the Skykomish claim was presented before August 13, 1951, in the original petition of the Snoqualmie because the Skykomish claim arose out of an 1855 Treaty which was the common transaction complained of in this petition, 2) the Snoqualmie Tribe was the only claimant before the Commission, 3) the government received adequate timely notice of the Skykomish claim in the timely filed petition, and 4) the government would not be prejudiced by the Snoqualmie's "tardiness in clarifying its position." 178 Ct. Cl. at 589, 372 F. 2d at 961. The Court made it clear that there were no conflicting claims between the Snoqualmie and the Skykomish Tribes.[19]

In *Snoqualmie* the Court of Claims anticipated its decision in the case at bar. In acknowledging that "there is much in the government's argument" the Court stated, "we would have greater difficulty allow-

[19] The Court found "There are no conflicting claims." 178 Ct. Cl. 570, at 575, 372 F. 2d 951, at 953.

ing the amendment if we thought it was brought by an entirely unrelated party even though it arose out of the same transaction." 178 Ct. Cl. 570, at 589, 372 F. 2d 951, at 961.

Snoqualmie, thus, supports the decision at bar. Unlike *Snoqualmie*, in the case at bar 1) there was no Wichita claim presented to the Commission until nearly 19 years after filing of claims were barred, 2) the Kiowa, Comanche and Apache Tribes were not the only claimants before the Commission, as the Wichita and Affiliated Tribes sought to be present in their own right, 3) neither the government nor these respondents had any notice of the Wichita claim as it was not presented in the timely filed petition of the Kiowa, Comanche and Apache Tribes, 4) the government and these respondents may be prejudiced by the tardy intervention, and 5) there is an admitted conflict between petitioners, the respondents and the government.[29] Chief Judge Cowan and Judge Davis, sitting in *Snoqualmie* also joined in the unanimous opinion in the case at bar.

It is, thus, apparent that neither *Blackfeet* nor *Snoqualmie* support petitioners' position. Just the contrary.

The Commission cited *Lipan Apache Tribe* v. *United States*, 22 Ind. Cl. Comm. 1 (1969), as its sole authority for the intervention which the Court of Claims reversed. In *Lipan*, the Commission allowed late intervention for three stated reasons 1) intervenors'

[29] Petitioners state "The Wichita Tribe does not claim that it has a joint interest with the Kiowa, Comanche and Apache Tribes, but the Wichita Tribe claims that it is the rightful aboriginal owner to the same area that the Kiowa, Comanche and Apache Tribes are claiming to be aboriginal owners of." (Pet. 23).

claims would not diminish original claimants' recovery, 2) the government's liability would not be increased, and 3) the government had no objection if the Commission found it had jurisdiction to allow the late intervention (22 Ind. Cl. Comm. 1, Pet. App. 3d). In the case at bar just the opposite is true, that is 1) the petitioners' intervention might defeat the respondent tribes' claims,[21] 2) the government's liability might be increased,[22] and 3) the government did and does object to this intervention.

In *Lipan*, the Commission cited *Blackfeet* and *Snoqualmie*, *supra*, as supporting the intervention there sought. As shown, those cases did not involve adverse claimants, as here. As the governing facts and law in *Lipan* are opposite to the case at bar, the Commission's reliance thereon to support this late intervention was misplaced, and the Court of Claims properly so found.

In summary, the propriety of intervention depends peculiarly upon the facts of each case. In the light of the facts and applicable law, it is plain to see why the Court of Claims concluded that to allow this intervention, nearly 20 years after respondents' claims were filed and the statutory period for filing claims had expired, "would work an injustice" on respondent Tribes. The Court of Claims, therefore, properly reversed the order of the Commission allowing petitioners' intervention.

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[21] The Court of Claims stated "It would work an injustice to allow them to join in a timely filed suit by the Appellees when the result of that intervention may be the defeat of the Appellees' claim, and of any claim." (Pet. App. 22a).

[22] See Note 13, *supra*.

C. The Contentions Made by Petitioners To Show Error Below Are Insubstantial.

The petition presents arguments and states positions that are contrary to law, common sense, and fact. It is confusing and defies ready analysis. It certainly does not "present with accuracy, brevity, and clearness" the points requiring consideration, as dictated by Rule 23.4 of this Court.

Analysis of the petition shows its many errors.

1. The basic argument in support of the propriety of its untimely intervention is that intervenor Tribes did not have counsel until they sought intervention. The fact is that the contract with present counsel for intervenors was officially approved pursuant to 72 Stat. 927, 25 U.S.C. 81, on June 11, 1968. From that date until filing the motion for intervention on March 16, 1970, such counsel engaged in representations before Congress in efforts to secure legislation permitting petitioners to file claims in the Indian Claims Commission notwithstanding the jurisdictional bar of limitations set out in 60 Stat. 1049, 1052, 25 U.S.C. 70k. On February 27, 1969, H.R. 7927 (91st Congress, 1st Session) was introduced in the House of Representatives, and on March 11, 1969, S. 1501 (*Id.*) was introduced in the Senate. S. 1501 is set out as Appendix 3 hereinafter. If enacted, these identical bills would have given petitioners the right to file their claims before the Commission within one year of enactment "notwithstanding the lapse of time or any statute of limitations." While both bills were referred to committee, no further action was taken by Congress. Petitioners, thus, spent almost two years in efforts to secure legislation to remove what they, logically, assumed was the legal jurisdictional bar of limitations.

But the absence of counsel does not excuse failure to file a timely claim before the Commission. The statute creating the Commission required notice of its provisions to be sent to each Tribe of Indians (60 Stat. 1049, 1052, 25 U.S.C. 70l; App. 1) and the record shows that the Wichita Tribe was aware of the existence and purposes of the Act well before their claims were barred.[23] The Act specifically allows the presentation of a claim to the Commission by any member of a tribe (60 Stat. 1049, 1052, 25 U.S.C. 70i; App. 1).[24] The General Rules of Procedure of the Commission in effect August 13, 1951, provided for the filing of claims by any tribe or any member of the tribe without necessity for counsel. Appendix 4 sets out the applicable provisions. Indeed, the Act provided that a "detailed statement of all claims be sent to the Commission" and that there be established an Investigation Division to investigate claims referred to it by the Commission, with the further requirement that that Division make available "to the Indians concerned" any data relating to the claims. (69 Stat. 1049, 1052, 25 U.S.C. 70 l(a) and (b); (App. 1). At page 21 of Exhibit A to the complaint in Intervention petitioners quote from an Annual Report of the Indian Claims Commission as follows:

> "The [Investigation] Division has been active in the investigation of cases where no attorney of record represents the claimants."

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[23] See Pet. App. 49g, where it is shown that the Wichita Tribe was aware at least "sometime in 1950" of the existence of the deadline of August 13, 1951, for filing their claims before the Commission. See also 51g, *id.* No attempt is made to show that the Affiliated Tribes ever sought to obtain counsel before 1968.

[24] *Seneca Nation of Indians on the relation of John L. Snyder and Arline A. Friday* v. *United States*, 122 Ct. Cl. 163 (1952).

The possibility of presenting timely claim without the necessity of counsel was, therefore, presented to petitioners. Mr. Lyle R. Griffis, who was then attorney-adviser with the Bureau of Indian Affairs, assigned to the local office servicing petitioners, in the letter relied upon by petitioners', states as much when he concluded

> "As a result, *the deadline date passed without the Wichita Tribe having filed any claims before the Commission* or having engaged counsel to represent them in the assertion of such claims." (Emphasis supplied. Pet. App. 64g).

2. On page 15 petitioners state that if a writ of certiorari is not granted they will have no legal recourse for asserting a claim for loss of "treaty title" lands. The Court of Claims denied any claim petitioners have to "treaty title" lands, and petitioners have not applied for a writ of certiorari directed to that action. This point, therefore, is invalid.[25]

3. Petitioners cite *C. W. McGhee, et al.* v. *The Creek Nation and the United States*, 122 Ct. Cl. 380, cert. den. 344 U.S. 856 (1952), as supporting their argument for late intervention (Pet. 16). In *McGhee* the motion for leave to intervene was filed on January 5, 1951, six months before August 13, 1951, the date of expiration of the statutory bar for presenting claims. The decision, therefore, is inapposite.

4. In *Joseph Chitto, et al.* v. *United States*, 133 Ct. Cl. 643, 138 F. Supp. 253, cert. den., 352 U.S. 841 (1956), relied upon by petitioners (Pet. 17), the Court

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[25] Petitioners' reliance upon respondents to protect their interest in the recognized title claim, as is suggested at Pet. 15, is misplaced. The reversal on recognized title is interlocutory as to these respondents.

of Claims properly allowed intervention of the Choctaw Nation made upon a showing that the United States had indicated that it would satisfy any judgment rendered in favor of the original plaintiffs out of funds of that Nation on deposit in the United States Treasury. This is not analogous to the case at bar.

5. Petitioners' erroneous concept of the applicable law is again exemplified at pages 25 and 26 of the petition. They argue (p. 25) that the Federal Rules of Civil Procedure on intervention should be followed by the Commission, and then, amazingly, state (p. 26) that, while intervention must be timely, there is no requirement in those Rules that there be no injustice to the timely claimant by a late filing. Assuming the applicability of the Rules,[26] petitioners overlook the last sentence of Rule 24(b), which recites,

> "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

6. Petitioners' real complaint (Pet. 27) is that if they are barred from appending their late claim to the

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[26] Petitioners admit that there are no rules of the Commission on intervention (Pet. 18). The Commission rules do not incorporate the Federal Rules of Civil Procedure. The Court of Claims, in *Seminole Indians of the State of Florida* v. *United States*, 200 Ct. Cl. 411 471 F.2d 614 (1973), recognized that the Commission could, with propriety, adopt such of the Federal Rules of Civil Procedure, as it deemed appropriate, except that it may not adopt rules contrary to the language of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70. See footnote 2,200 Ct. Cl. at 424, 471 F.2d at 617. Here, of course, the Commission could not adopt a rule that would in any way circumvent the finality of the statutory time limit for presenting claims.

timely filed petition of these respondents they may lose a third opportunity to press a claim which has been twice held to be without merit on the facts by the Court of Claims. *Choctaw and Chickasaw Nations, et al.* v. *United States*, 34 Ct. Cl. 17, reversed, 179 U.S. 494 (1900), *Wichita Tribe, et al.* v. *United States*, 89 Ct. Cl. 378 (1939). Although, in each case the conclusion that the petitioners could not sustain the claim of aboriginal possession there advanced was without the jurisdiction of the Court of Claims, the careful factual findings against such possession is conclusively against petitioners on the merits.[27]

7. At page 29 of the petition the assertion is made that the Congress has extended the Commission's life from 1956 to 1977, without an extension of the time for filing claims beyond the original date of August 13, 1951. This fact tends to show Congressional intent that the limitations bar should be strictly enforced, rather than the contrary. In the same argument, at page 30, petitioners make the incredible statement that intervention is allowed by the Commission only when it is "of the opinion that the intervening claimants apparently have just claims * * *." Petitioners would convert a mere claim in a petition into a holding on the justice of the claim.[28]

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[27] Petitioners' suggestion (Pet. App. 17g, 58g-60g) that counsel refrained from representing them in 1950 and 1951, on the ground that the cases just cited are *res judicata*, so far as undersigned counsel is involved, is not true.

[28] The Court of Claims correctly held in *Clyde F. Thompson, et al.* v. *United States*, 122 Ct. Cl. 348, 356, cert. denied, 344 U.S. 856 (1952), that "For jurisdictional purposes, which related only to the authority to entertain the petition and to hear and determine claims, the merits and the nature of the proof that will be required to establish the claims, are not involved."

Of like invalidity is the specious reasoning that because the intervenors borrowed money from the government to finance litigation that the government "had considerable faith in the validity of the [petitioners'] claims." (Pet. 34). Equally frivolous would be the argument that because the government was presently paying the expenses of the Department of Justice to oppose their intervention that petitioners' claim was unfounded.

8. Petitioners make the astonishing argument that "perhaps" the Commission allowed intervention below because this Court, in the exercise of its original constitutional jurisdiction, might, *sua sponte*, order that other States be given an opportunity to join in a suit by the government against a single State. (Pet. 30). There is a difference between the constitutional original jurisdiction of this Court and the statutory jurisdiction of the Commission. It does the Commission little credit to assume, as petitioners do, that it allowed intervention under the constitutional original jurisdiction given exclusively to this Court.

9. Petitioners cite *Hodgson* v. *United Mine Workers of America*, 473 F.2d 118 (1972), as supporting their position (Pet. 34). *Hodgson* was a case of intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. Petitioners admit (p. 20) that their intervention was "permissive," i.e., under Rule 24(b). There is a difference.

10. Petitioners at page 35 quote, out of context and in a manner which might mislead, a portion of the legislative history of an Act which extended the time for concluding claims before the Commission (81 Stat. 11, 25 U.S.C. 70v). In the third paragraph on page

35, the implication is covert that the Assistant Secretary of the Interior was then speaking of petitioner Tribes, or, at least, of tribes who sought to be heard notwithstanding their failure to make timely claims. Reference to the complete text of the letter (Pet. App. H), shows that the language petitioner chooses to invoke related to timely claims of tribes who were then in the process of litigating such claims. When considered in the proper light, this quotation shows proper concern for those who had acted pursuant to law in presenting their claims, and was not intended to benefit the dilatory.

Petitioners' arguments in support of its position here are, therefore, not persuasive. The Court of Claims correctly decided the case below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully,

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Attorney for Respondents, The Kiowa, Comanche and Apache Tribes of Indians.

January, 1974

APPENDIX 1

Additional Pertinent Provisions of Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, et seq.

§ 70i. Presentation of Claims

Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission. (60 Stat. 1052, 25 U.S.C. 70i)

* * * *

§70l. Notice to tribes; investigation of claims; availability of data

(a) As soon as practicable the Commission shall send a written explanation of the provisions of this chapter to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the Unted States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and

thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian. (60 Stat. 1052, 25 U.S.C. 70 l)

* * * *

§70s. Review by Court of Claims and Supreme Court

* * * *

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided*, That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law,

including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section. (60 Stat. 1054, 25 U.S.C. 70s(b)

APPENDIX 2

Table Showing Action by the Supreme Court of the United States on All Prior Petitions for Writs of Certiorari to the Court of Claims on Indian Cases Appealed from the Indian Claims Commission

Title of Case	Certiorari Action by Supreme Court
1. Eastern (Emigrant) Cherokee Indians ex rel. Nash v. United States	Denied, 340 U.S. 903
2. Western (Old Settler) Cherokee Indians ex. rel. Owen v. United States	Denied, 340 U.S. 904
3. United States v. Loyal Band or Group of Creek Indians	Denied, 342 U.S. 813
4. United States v. Osage Nation of Indians	Denied, 342 U.S. 896
5. Choctaw Nation v. United States	Denied, 343 U.S. 955

Title of Case	Certiorari Action by Supreme Court
6. Creek Nation v. C. W. McGhee, et al.	Denied, 344 U.S. 856
7. United States v. C. W. McGhee, et al.	Denied, 344 U.S. 856
8. United States v. Clyde F. Thompson (Indians of California)	Denied, 344 U.S. 856
9. United States v. Risling (Indians of California)	Denied, 344 U.S. 856
10. Blackfeet and Gros Ventre Tribes of Indians v. United States	Denied, 348 U.S. 835
11. Assiniboine Indian Tribe v. United States	Denied, 348 U.S. 863
12. United States v. Otoe & Missouria Tribe of Indians	Denied, 350 U.S. 848
13. Choctaw Nation v. United States	Denied, 352 U.S. 825
14. Joseph Chitto, ex rel. Choctaw Indians East of Mississippi River v. United States	Denied, 352 U.S. 841
15. Yuchi (Euchee) Tribe of Indians, et al. v. United States	Denied, 352 U.S. 1016 Rehearing denied, 353 U.S. 919 Motion for leave to file second petition for rehearing denied, 353 U.S. 948

Title of Case	Certiorari Action by Supreme Court
16. Ingraham Billie, ex rel. Miccosukee Seminole Indians v. Seminole Indians of the State of Florida	Denied, 355 U.S. 843
17. Hannahville Indian Community, et al. v. Prairie Bond of Potawatomi Indians et al.	Denied, 359 U.S. 908
18. United States v. Kiowa, Comanche & Apache Tribes of Indians	Denied, 359 U.S. 934
19. Kiowa, Comanche & Apache Tribes of Indians v. United States	Denied, 359 U.S. 934
20. Makah Indian Tribe v. United States	Denied, 365 U.S. 879
21. United States v. Miami Tribe of Oklahoma	Denied, 366 U.S. 924
22. United States v. Crow Tribe of Indians	Denied, 366 U.S. 924
23. United States v. Absentee Shawnee Tribe of Oklahoma	Denied, 366 U.S. 924
24. Creek Nation v. United States	Granted, 368 U.S. 811 (Affirmed, 370 U.S. 157)
25. Pueblo dePecos, et al. v. United States	Denied, 368 U.S. 821
26. Pueblo deIsleta v. United States	Denied, 368 U.S. 822

Title of Case	Certiorari Action by Supreme Court
27. Sioux Tribe of Indians, etc. v. United States	Denied, 375 U.S. 825
28. Sac & Fox Tribe of Indians of Oklahoma v. United States	Denied, 375 U.S. 921
29. Nooksack Tribe of Indians, etc. v. United States	Denied, 375 U.S. 993
30. Creek Nation East of the Mississippi v. United States	Denied, 379 U.S. 846 Rehearing denied, 379 U.S. 918
31. Ottawa Tribe, et al. v. United States	Denied, 379 U.S. 929
32. Oneida Tribe of Indians of Wisconsin v. United States	Denied, 379 U.S. 946
33. Quechan Tribe of Fort Yuma Reservation v. United States	Denied, 379 U.S. 971
34. Muckleshoot Tribe of Indians v. United States	Denied, 385 U.S. 847
35. Nez Perce Tribe of Indians v. United States	Denied, 386 U.S. 984 Clarification denied, 386 U.S. 1015
36. Peoria Tribe of Indians of Oklahoma v. United States	Granted, 389 U.S. 814 (Reversed, 390 U.S. 468)
37. Iowa Tribe, etc. v. United States	Denied, 389 U.S. 900

Title of Case	Certiorari Action by Supreme Court
38. United States v. Sac & Fox Tribe of Indians of Oklahoma	Denied, 389 U.S. 900
39. Citizen Band of Potawatomi, etc. v. United States	Denied, 389 U.S. 1046
40. Hannahville Indian Community, et al. v. United States	Denied, 390 U.S. 957
41. Gila River Pima-Maricopa Indian Community v. United States	Denied, 400 U.S. 819
42. United States v. Southern Ute Tribe or Band of Indians	Granted, 400 U.S. 915 (Reversed, 402 U.S. 159)
43. Nez Perce Tribe of Indians v. United States	Denied, 404 U.S. 872
44. Iowa Tribe of the Iowa Reservation, etc. v. United States	Denied, 404 U.S. 1017
45. The Creek Nation v. United States	Denied, 406 U.S. 929
46. Ira Sylvester Godfroy, et al. v. United States	Denied, October 9, 1973 ——U.S.——

APPENDIX 3

91ST CONGRESS
1ST SESSION

S. 1501

IN THE SENATE OF THE UNITED STATES

March 11 (legislative day, March 7), 1969

MR. HARRIS (for himself and MR. BELLMON) introduced the following bill; which was read twice and referred to the Committee on Interior and Insular Affairs

---

A BILL

Authorizing the Wichita Indian Tribe of Oklahoma, together with its affiliated bands and groups of Indians, to file with the Indian Claims Commission within one year any and all claims of said tribe against the United States, and repealing any law inconsistent to this Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Wichita Indian Tribe of Oklahoma and bands and groups of Indians which have been or which are affiliated with the Wichita Indian Tribe of Oklahoma, including but not limited to the Wichitas, Wacos, Keechis, and Towaconies, may file with the Indian Claims Commission any and all claims that they now have or may have had, against the United States, pursuant to jurisdiction conferred upon the Indian Claims Commission, to hear and determine the claims of Indian tribes, bands or groups of American Indians that accrued prior to August 13, 1946, against the United States, as provided in the Act of

August 13, 1946 (60 Stat. 1049, 1055), as amended and supplemented, Act of July 24, 1956 (70 Stat. 624), Act of June 16, 1961 (75 Stat. 92), Act of November 4, 1963 (77 Stat. 301), Act of September 19, 1966 (80 Stat. 814), and Act of April 10, 1967 (81 Stat. 11) (25 U.S.C. 70-70v-1).

SEC. 2. Such claims may be instituted and filed at any time within one year after the passage of this Act, notwithstanding the lapse of time or any statute of limitations.

SEC. 3. All provisions of law inconsistent with the provisions of this Act are hereby repealed to the extent of such inconsistency.

91ST CONGRESS
1ST SESSION

S. 1501

A BILL

Authorizing the Wichita Indian Tribe of Oklahoma, together with its affiliated bands and groups of Indians, to file with the Indian Claims Commission within one year any and all claims of said tribe against the United States, and repealing any law inconsistent to this Act, and for other purposes.

By MR. HARRIS and MR. BELLMON

March 11 (legislative day, March 7), 1969

Read twice and referred to the Committee on Interior and Insular Affairs

APPENDIX 4

Extracts from Code of Federal Regulations, 1949 Edition, Title 25, Indians, Chapter III Indian Claims Commission, Part 503.

AUTHORITY: §§ 503.1 to 503.40 issued under sec. 9, 60 Stat. 1051; 25 U.S.C. 70h.

SOURCE: §§503.1 to 503.40 appear at 12 F.R. 4387.

§ 503.1 *Petitioners.* (a) Claims within the jurisdiction of the Indian Claims Commission of the United States (60 Stat. 1049), hereafter referred to in this part as the Commission, may be presented by any Indian tribe, band or other identifiable group of Indians.

(b) Claims by Indian tribes, bands or groups which have tribal organizations recognized by the Secretary of the Interior as having authority to represent such tribe, band or group shall be filed and presented by the duly appointed or elected officers of such organization, except as provided in paragraph (c) of this section.

(c) Where by virtue of fraud, collusion or laches on the part of a recognized tribal organization a claim has not been presented (or has not been included as part of a presented claim), any member of such tribe, band or group may file claim on behalf of all the other members of such tribe, band or group upon complying with the provisions of § 503.8 (a).

(d) Claims on behalf of any unorganized tribe, band or other identifiable group may be filed by any member of such tribe, band or identifiable group as the representative of all its members. (p. 377)

* * * *

§503.8 *Capacity.* (a) Petitions filed by any tribal organization recognized by the Secretary of the Interior as having authority to represent a tribe, band or group need not aver the capacity of such organization to sue except to the extent required to show the jurisdiction of the Com-

mission. When the United States desires to raise an issue as to the capacity of such a recognized tribal organization to sue, it shall do so by specific negative averments, which shall include supporting particulars.

(b) If a petition is filed by one or more members of a tribe, band or other identifiable group having a tribal organization which is recognized by the Secretary of the Interior because the tribal organization has failed or refused to take any action authorized by the act, the petition shall be verified and shall aver that the petitioner is a member of the tribe, band or group. The petitioner shall also set forth with particularity the efforts of the petitioner to secure from the duly constituted and recognized officers of said tribal organization such action as he desires and the reasons for his failure to obtain such action (such as fraud, collusion or laches) or the reasons for not making such effort.

(c) Petitions filed by one or more members on behalf of an unorganized tribe, band or other identifiable group shall be verified and shall aver (1) that the petition or petitioners are members of the tribe, band or group (2) a description of the unorganized tribe, band or group of sufficient comprehension to identify the tribe, band or group on whose behalf the petition is filed. (p. 380)

* * * *

§ 503.9 *Form of pleadings—(a) Caption; names of parties.* Every pleading shall contain a caption setting forth the name of the Commission, and the title of the action, and a designation as in §503.6(a). A petition filed on behalf of a tribal organization under the provisions of § 503.1 (b) shall be commenced in the name of such tribe, band or group. A petition filed on behalf of an organized tribe, band or group under the provisions of § 503.1 (c), or an unorganized group under § 503.1 (d), shall be in the name of the member or members filing the same on the

relation of the tribe, band or group. In the petition, the title of the action shall include the names of all the parties, but in other pleadings it shall be unnecessary to name more than one of the petitioners. (p. 380)

* * * *

§ 503.10 *Signing of pleadings*—(a) *Petitioner.* Every pleading of a party other than the United States represented by an attorney shall be signed by the attorney of record, designated under § 503.35 in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign its pleading and state its address. (p. 380)

SUPREME COURT U. S.
FILED
MAR 15 1974
MICHAEL RODAK, JR., CLERK

No 73-984

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE WICHITA INDIAN TRIBE OF OKLAHOMA ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A, 1a-36a) is reported at 479 F.2d 1369. The opinion of the Indian Claims Commission (Pet. App. D, 1d-10d) is reported at 22 Ind. Cl. Comm. 1.

JURISDICTION

The judgment of the Court of Claims was entered on June 20, 1973. The order of the Court of Claims denying the petitioners' timely motion for a rehearing was entered on September 28, 1973 (Pet. App. B, 1b-2b). The petition for a writ of ceritorari was filed on December 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the intervention by petitioners in a suit between other tribes and the United States, nearly 20 years after the final date for filing claims before the Indian Claims Commission, is barred by the statute of limitation contained in the Indian Claims Commission Act, 60 Stat. 1049, 1052, as amended, 25 U.S.C. 70k.

STATUTE INVOLVED

Section 12 of the Indian Claims Commission Act of 1946, 60 Stat. 1052, 25 U.S.C. 70k, provides in pertinent part:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claims existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

STATEMENT

Petitioners moved to intervene in the timely filed case of the Kiowa, Comanche and Apache Tribes, Docket No. 257, before the Indian Claims Commission, on March 16, 1970, nearly 20 years after August 13, 1951, the final date for filing claims before the Indian Claims Commission. In their intervention motion, petitioners claimed compensation for lands in western Texas and Oklahoma, which they alleged they owned by aboriginal title and which they alleged had been taken from them by the United States without just compensation. Their claim was adverse to that of the plaintiffs, who claimed aboriginal title to much of the same land, and, additionally, increased the total claim against the United States. The

Commission allowed the intervention 24 Ind. Cl. Comm. 405 (Pet. App. C, 1c-2c). The United States appealed to the Court of Claims which reversed the decision of the Indian Claims Commission and remanded the case for further proceedings consistent with the Court of Claims' Opinion.

ARGUMENT

1. The Indian Claims Commission Act, *supra*, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and *no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.* [60 Stat. 1049, 1052, 25 U.S.C. 70k. Emphasis supplied.]

Thus Congress, in establishing the Commission and in creating a cause of action where, for the most part, none had existed before, emphatically required that all claims under the Act be brought within the time period specified in the Act, or be barred. Petitioners did not bring their claim until almost twenty years after the cut-off date of August 13, 1951, established by the Act. The Act is jurisdictional and petitioner's intervention was thus properly denied. *United States ex rel. Texas Portland Cement Company* v. *McCord*, 233 U.S. 157, 162.

2. It is true as petitioners point out (Pet. 20-22) that the Court of Claims in *The Blackfeet and Gros Ventre Tribes, et al.* v. *United States*, 162 Ct. Cl. 136, permitted an intervention after the date for filing an original claim had passed. That case, however, presented a peculiar situation in which the original claimants sought a recovery based upon a treaty to which both they and the intervenors were signatories. Prior litigation had established that

they jointly owned the land in question and had established the percentage of ownership of each. The Court of Claims held that the claim by one joint owner preserved the claim of the other. *Id.* at 142. In so holding the court noted that all of the issues presented in the intervention were present in the original claim, that the government thus had had notice of those claims from the time the original suit was filed, and that the course of litigation would not be interrupted by permitting the intervention. The court concluded that "the [intervenors] are not asserting a new or separate claim which would be untimely under section 12 of the Act" *(id. at* 144).

Here, by contrast, there is no common and undivided or joint interest between the petitioners and the Kiowa, Comanche and Apache Tribes. They are not signatories to a common treaty. Moreover, the question whether the petitioners had aboriginal title to much of the land claimed by the original claimants presents a new and adverse claim dependent on different facts—and which, as the Court of Claims noted, could result in the defeat of the claim of both claimants if it showed that neither had exclusive possession of the land (Pet. App. A, 21a).

Since the petitioners do not have a joint claim with that of the original claimants and rely on different and inconsistent allegations of fact, the petitioners' claim for aboriginal title was obviously not presented by the timely filed claim of the Kiowa, Comanche and Apache Tribes and has not been preserved.[1]

---

[1] *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, also relied upon by petitioners, does not, as they admit (Pet. 26), concern intervention by a new party, but a liberal interpretation by the Court of Claims allowing the original claimant to amend its pleadings. There is no conflict between that case and the present case.

3. There is no conflict between the decision of the Court of Claims and that of any other court except an arguable conflict with a decision of the Indian Claims Commission. See *Lipan Apache Tribe, et al.* v. *United States*, 22 Ind. Cl. Comm. 1 (Pet. App. D). The Court of Claims, however, has appellate jurisdiction over the Indian Claims Commission. Section 20, Act of August 13, 1946, 60 Stat. 1054, as amended, 25 U.S.C. 70s. There is thus no conflict requiring resolution by this Court. Moreover, while considerable liberality is appropriate in interpreting grounds for relief under the Indian Claims Commission Act, it would be a gross distortion of the Act to keep it perpetually alive by allowing unlimited intervention after the limitation date. The Court of Claims in this case and *Blackfeet* has drawn appropriate boundaries for intervention and further review is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

RAYMOND N. ZAGONE,
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BERNARD M. SISSON,
Attorneys.

MARCH 1974.

DOJ-1974-03

SUPREME COURT, U. S.
MAR 23 1974
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OCTOBER TERM, 1973

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Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY AND SUPPLEMENTAL BRIEF FOR THE WICHITA INDIAN TRIBE OF OKLAHOMA, ET AL., PETITIONERS

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES,

Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY AND SUPPLEMENTAL BRIEF FOR THE WICHITA INDIAN TRIBE OF OKLAHOMA, ET AL., PETITIONERS

Pursuant to Rule 24 this Reply and Supplemental Brief will answer certain

allegations made by the Respondents and one of the principal authorities of Petitioners will be a case decided by this Court since this Petition for Certiorari was filed on December 24, 1973.

In the Brief for the Kiowa, Comanche and Apache Tribe of Indians in Opposition at Page 2, Footnote 1, the said Respondent stated that it cannot understand why the Petitioners quote Rule 24 (a) of the Federal Rules of Civil Procedure because the Petitioners cited Lipan Apache v. United States, 22 Ind. Cl. Comm. 1 (1969) as a case of permissive intervention and Petitioners, after re-checking their Petition for Writ of Certiorari together with their Separate Appendix, find that on the first four lines of the middle paragraph on Page 20 of the Petition for Certiorari there appears the statement that the intervention of the Tigua Indian Community was permissive and supported by two cases of the Court of Claims. Your Petitioners also requested in their Petition for Certiorari that this Court read the Lipan opinion in detail, which is set out in the Separate Appendix of the Petitioners to their Petition for Certiorari in Appendix D in the said Separate Appendix at Page 4d and in particular in the last paragraph at the bottom of Page 4d wherein the Indian Claims Commission stated as follows: "Our conclusion to permit intervention is supported by two cases decided by the Court of Claims." Counsel for the Petitioners states that he dictated the middle paragraph at Page 20, which if correctly transcribed, would have read as

follows: "The Lipan Apache opinion stated that intervention for the Tigua Indian Community was permitted and supported by two cases as cited by the Court of Claims, etc." This, of course, is the correct interpretation of the import of Lipan Apache v. United States and no portion or part of the Lipan Apache v. United States decision by the Indian Claims Commission makes any statement concerning permissive intervention. It was grammatically incorrect to have joined permissive and supported together with the conjunction "and" because permissive is an adjective and supported is a verb, but as dictated and if correctly transcribed, the sentence was grammatically correct because permitted is a verb and was joined with another verb, namely, supported, which of course, is grammatically correct.

Your Petitioners state that the Kiowa, Comanche and Apache Tribes, one of the Respondents, in their Brief in Opposition state that Hodgson v. United Mine Workers, 473 F.2d 118 (1972) is not in point because the Petitioners admitted that their intervention was permissive. As heretofore stated, the Petitioners have never implied that the right of the Petitioners to intervene was a permissive intervention and a casual reading of the voluminous Briefs that the Petitioners have filed heretofore before the Indian Claims Commission and before the Court of Claims will verify the statement that the Petitioners do not now and have never in the past stated that their intervention was permissive.

The Petitioners have always stated that their right to intervene should and does fall within Rule 24 of the Federal Rules of Civil Procedure which is the Rule on intervention and in particular paragraph (a) INTERVENTION OF RIGHT. At pages 1a and 2a in said Appendix A attached to this Reply and Supplemental Brief, there appears an Order of the Indian Claims Commission issued on the 16th day of January, 1974, after Petitioners filed their Petition for Certiorari, wherein the Indian Claims Commission again reiterates the procedure that where there is no rule of the Indian Claims Commission that applies, the accepted procedure is to follow the Federal Rules of Civil Procedure which in the particular Order to Show Cause was the adoption of Rule 54 (b) of the Federal Rules of Civil Procedure by the Indian Claims Commission because it does not have an applicable rule of its own. Therefore, the premise that the Federal Rules of Civil Procedure apply when no rules of procedure have been promulgated by the Indian Claims Commission, is a correct and valid premise and the Federal Rule of Civil Procedure for intervention is the governing rule for determination of intervention before the said Indian Claims Commission.

Your Petitioners state that Appendix B attached to this Reply and Supplemental Brief and in particular Pages 1b through 5b inclusive is an excellant summary of the applicable law relative to the timeliness of intervention where intervention is sought as a matter of right and the basic rule is that the amount of

time which has elapsed since the litigation began is not of itself the determinative test of timeliness, but the correct test is that the Court should look to related circumstances, including the purpose for which the intervention is sought, etc. Your Petitioners wish to state that in the Brief in Opposition filed by both Respondents, that is, the Kiowa, Comanche and Apache Tribes of Indians and by the United States, the statement is made that the Indian Claims Commission Act is jurisdictional and if a claim is not brought within the period of time specified in the Act, the claim would be barred and both of the Respondents have given as authority for this premise a decision of this Court styled, "United States ex rel Texas Portland Cement Company v. McCord," 233 U.S. 157. This decision was rendered on April 6, 1914, therefore, it is certainly not a late decision. The limitation phase of said suit pertained to a right of action upon a statutory contractors bond and this Court made the statement that the statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability becomes a part of the right conferred and is jurisdictional.

Your Petitioners, of course, realize that this Court has recently issued an Opinion from which excerpts are set out in Appendix C to your Petitioners Reply and Supplemental Brief and the said Appendix C contains Pages 1c through 6c inclusive. This opinion, of course, was issued on January 16, 1974, after your Petitioners filed their Petition for

Certiorari herein, therefore, for that reason, your Petitioners will discuss the importance of this decision somewhat in detail. Of course, the said case of American Pipe Line Construction Company, et al., v. the State of Utah, et al., 94 S. Ct. 756, 42 LW 4155 was an action for triple damages under the Sherman Act, but Eleven days short of one year after a civil action by the United States to restrain violations of the Sherman Act, Clayton Act and False Claims Act was terminated by a consent decree, the State of Utah commenced a purported class action against the same defendants for treble damages for violation of the first section of the Sherman Act. After ruling that the action could not be maintained as a class action, 49 F.R.D. 17, the United States District Court for the Central District of California, 50 F.R.D. 99, denied applications of previously prospective class members for permission to intervene on the ground that claims of intervenors were barred by limitation. The Court of Appeals reversed, 473 F.2d 580, as to denial of permissive intervention. Certiorari was granted. The Supreme Court, Mr. Justice Stewart, J., held that at least where class action status has been denied solely for failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' commencement of original class suit tolls the running of the limitation statute for all purported members of the class who make timely motion to intervene by permission or as of right after the court has found suit inappropriate for class action.

In the said Appendix C a portion of this decision is set out because it appears to the Petitioners to be very germane and this decision has, as of the present time, received a limited printing and circulation. Those opposing the intervention in said case used as authority The Harrisburg v. Rickards, 119 U.S. 199, which is a case even before the case cited by the Respondents concerning the fact that where the Statute creates a liability, the time within which the suit must be brought operates as a limitation of the liability itself as created. This Court stated that the Harrisburg v. Rickards case does not restrict the Federal Judicial power to delineate circumstances where the applicable Statute of Limitation would be tolled. Your Petitioners believe that this Court, if it applies the same over all reasoning that was applied in American Pipe Line Construction Co. v. Utah, this Court will be able to find that there is no valid reason why the intervention of the Wichita's should not be permitted in this case.

The United States was put on notice within the statutory time to defend a claim for the wrongful taking of aboriginal Indian lands in Western Oklahoma and in the Northern and Western part of Texas, which claim was filed against the United States for the wrongful taking of said lands by the Kiowa, Comanche and Apache Tribes of Indians, one of the Respondents herein, therefore, allowing intervention in said claim by the Wichita's will permit essential fairness and the United States

will not be prejudiced in its defense against said claim after the Wichita intervention. As set out in the Petitioners' Petition for Certiorari, the United States filed its Answer on March 1, 1955, in Docket 257 before the Indian Claims Commission wherein the United States by its pleadings affirmatively stated that it was familiar with the claims of the Wichita Indian Tribe for title to the said aboriginal lands in question. (See Petitioners Petition for Certiorari, Pages 30 through 31 inclusive).

The Court of Claims in its decision rendered on June 20, 1973, reported at 479 F.2d 1369 (1973) for which this Petition for Certiorari was filed, makes an unusual determination that if the Wichita Indians were allowed to intervene, the end result might be that no valid claim would be adjudicated for aboriginal title against the United States for the said lands in question. In other words, the Court of Claims is making a determination and argument in the exact converse of the usual argument for disallowing a late intervention or a late suit after the usual Statute of Limitation has run.

Reiterating, the usual argument for requiring suits or claims to be filed within the normal Statutory period is that if the suits or claims are filed later, the Defendant would be prejudiced and could not defend properly and the Defendant's liability might be increased if claims or interventions were permitted

to be filed late which, of course, is the ordinary and usual argument against a late claim or suit or intervention after the usual time for limitations, but the Court of Claims, apparently, in its desire to fully protect the Kiowa, Comanche and Apache Tribes of Indians even though they had been before the Indian Claims Commission two different times, once in 1957 in Docket 32 when the Respondent, the Kiowa, Comanche and Apache Indians received a net final award of $2,067,166.00 and again in 1968 in the combined Dockets of 258 and 259 wherein the Respondent, the Kiowa, Comanche and Apache Tribes of Indians, received a net final award of $6,000,000.00, stated that it would be unfair to the Kiowa, Comanche and Apache Tribes to allow the Wichita's to intervene at the time they were permitted to intervene by the Indian Claims Commission for the reason that their intervention might result in there being no liability assessed against the United States. It appears to the Petitioners that if the Respondent, the United States, would not be prejudiced by the intervention of the Wichita's at a time after the normal running of the Statutes of Limitations, there should be no valid reason for barring the intervention of the Wichita Indian Tribe and if the premise of the Court of Claims is correct, the liability of the United States might be considerably larger if the Wichita's are not allowed to intervene than it would be if the Wichita's were permitted to intervene.

Your Petitioners believe that the legislative intent and purpose of the Indian Claims Commission Act was to give

all Tribes their day in Court and by the allowing of intervention of the Wichita's herein, the over all legislative intent of Congress for the disposal of Indian claims would be consumated.

Your Petitioners in this penult paragraph of their Reply and Supplemental Brief wish to defend their position taken in their Petition for Certiorari at Page 30 wherein your Petitioners stated that perhaps the Indian Claims Commission had in mind the case of U.S. v. State of La., 1957, 77 S. Ct. 1373, 354 U.S. 515, 1 L. Ed. 2d 1525 when the Indian Claims Commission allowed intervention. This premise was strongly criticized by the Respondent, the Kiowa, Comanche and Apache Tribes in their Brief in Opposition at Page 20. A casual re-examination of this decision by the Court will reiterate that the authority for such ruling was Rule 9 (2) (6) of this Court and Rule 21 of the Federal Rules of Civil Procedure and the general authorative power and equity to order additional parties to be brought in.

Your Petitioners herein again request that a Writ of Certiorari be issued to the Court of Claims in this matter.

Respectfully submitted,

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March 21, 1974

APPENDIX A

33 Ind. Cl. Comm. 51

BEFORE THE INDIAN CLAIMS COMMISSION

LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, ET AL.,	)	
Plaintiffs,	)	Docket No. 363
v.	)	(Second Claim Act of 1904)
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER TO SHOW CAUSE WHY A FINAL JUDGMENT MAY NOT BE ENTERED

On June 30, 1973, the Commission entered an interlocutory order holding the United States liable for the Fifth Amendment takings of reservation lands of plaintiffs, and ordering that the case proceed for the purpose of determining the amount of payments and offsets allowable, if any. A pretrial hearing was held on July 26, 1973. Plaintiffs filed a proposed pretrial order on September 14, 1973, defendant filed a proposed pretrial order on October 23, 1973, and plaintiffs filed a response on October 29, 1973. Defendant submitted into evidence accounting reports and records and both parties submitted proposed findings of fact and final judgments in their proposed pretrial orders.

The parties are in agreement concerning the dates and amounts of payments, and allowable gratuities. The parties are also in agreement that the Commission should direct that a final judgment be entered as to the award covered by this phase of Docket 363, in accordance with Rule 54(b), F.R. Civ. P., relating to multiple claims in a single action. Wherefore,

UPON CONSIDERATION of the parties' proposed pretrial orders, and the response thereto, and the findings of fact and opinion entered this day herein, and being fully advised in the premises,

IT IS HEREBY ORDERED that the parties will have thirty days to show cause why a final award of $8,286,991.54 plus simple interest at five per cent per annum on the principal sum of $1,888,162.46 from January 1, 1974, until paid, should not be entered.

Dated at Washington, D.C., this 16th day of January 1974.

s/s Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

s/s John T. Vance
John T. Vance, Commissioner

s/s Richard W. Yarborough
Richard W. Yarborough, Commissioner

s/s Margaret H. Pierce
Margaret H. Pierce, Commissioner

s/s Brantley Blue
Brantley Blue, Commissioner

APPENDIX B

AN EXCERPT FROM HODGSON V. UNITED MINE WORKERS OF AMERICA, 473 F.2d 118 (1972). THE FOLLOWING EXCERPT FROM THE ABOVE OPINION APPEARS ON PAGES 128 and 129 FROM THE SAID CITATION IN QUESTION.

(16) Having discovered no evidence reflecting a legislative purpose inimical to intervention by union members in the Secretary's suits, we must move on to a consideration of the requirements of Rule 24 (a) (2), especially as they are treated in Trbovich, in order to further evaluate appellants' claim. In the present case, the District Court found the application of appellants as proposed intervenors to be untimely. With all due deference to the court's view on that matter, we must disagree. While timeliness is a prerequisite to any claim for intervention under Rule 24,[64] it is set-

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64. See note 35 which is as follows: Rule 24 provides for intervention either as of right or by permission:
(a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is

(Footnote 64 continued on Page 2 b)

tled-particularly where intervention is sought as of right-that the amount of time which has elapsed since the litigation began is not in itself the determina-

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(Footnote 64 Continued from Page 1b)

> protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its direction the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(a)-(b).

tive test of timeliness.[65] Rather, the court should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights,[66] and the improbability of prejudice to those already parties in the cas.[67]

(17) To be sure, appellants' application for intervention was made after the action was tried, and some seven years after it was filed. But the proposed intervenors expressly disavowed any desire to reopen any previously-litigated question, and sought only to participate in the remedial, and if necessary the appellate, phases of the case. This limited goal does not appear to impose any untoward burden on the UMWA, the Sec-

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65. Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, 5 F.R.D. 174, 177 (N.D.Ala. 1946).

66. Wolpe v. Poretsky, 79 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, cert. denied, 323 U.S. 777, 65 S. Ct. 190, 89 L.Ed. 621 (1944); 3B J. Moore, Federal Practice § 14.13 (1) at 24-522 (2d ed. (1969).

67. Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, supra note 62, 5 F.R.D. at 177.

retary or the court.[68] Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved.[69] As we declared in Wolpe v. Poretsky,[70] intervention ' . . . may be allowed (even) after a final decree where it is necessary to preserve some right which

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68. See Trbovich v. UMWA, supra note 16, 404 U.S. at 536, 92 S. Ct. 630. Here the union has already been summoned into court by the Secretary to defend the validity of the trusteeships; intervention by appellants would not require any more than that. In terms of assisting in the shaping of relief, appellants clearly offer more of a benefit than burden to the Secretary.

69. Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129, 136, 87 S. Ct. 932, 17 L.Ed. 2d 814 (1967); System Federation No. 91 v. Reed, 180 F.2d 991, 998 (6th Cir. 1950); Wilson v. City of Paducah, 100 F. Supp. 116, 118 (W.D.Ky.1951); 3B J. Moore, Federal Practice § 24.13(1) at 24-527-28 (2d ed. (1969).

70. Supra note 66.

cannot otherwise be protected.'[71] It can hardly be gainsaid that appellants have rights which could be lost irretrievably were intervention not permitted at this time.

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71. 79 U.S.App. D.C. at 144, 144 F.2d at 508.

APPENDIX C

EXCERPTS FROM AMERICAN PIPE AND CONSTRUCTION CO. ET AL., V. STATE OF UTAH, ET AL., 94 S. Ct. 756, DECIDED JANUARY 16, 1974, AND FULLY REPORTED IN 42 LW 4155 through 4163 INCLUSIVE. THIS CASE WAS DECIDED BY THIS COURT SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI HEREIN.

* * * As the Court stated in Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, statutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Id., at 348-349. The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights.' Burnett v. New York Central Railway, 380 U.S. 424, 428, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine

both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchent, see, e.g., American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972); H. Friendly, Federal Jurisdiction: A General View 118-120 (1973); Handler. The Shift from Substantive to Procedural Innovations in Antitrust Suits-The Twenty-Third Annual Antitrust Review, 71 Col. L. Rev. 1, 5-12 (1971); Handler, Twenty-Fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 34-42 (1972), this interpretation of the Rule is nontheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve.

III

The petitioners contend, however, that irrespective of the policies inherent in Rule 23 and in statutes of limitations, the federal courts are powerless to extend

the limitation period beyond the period set by Congress because that period is a 'substantive' element of the right conferred on antitrust plaintiffs and cannot be extended or restricted by judicial decision or by court rule. Unlike the situation where Congress has been silent as to the period within which federal rights must be asserted, in the antitrust field Congress has specified a precise limitation period, and further has provided for a tolling period in the event that government litigation is instituted. The inclusion of the limit and the tolling period, the petitioners assert, makes the 'substantive' statute immune from extension by 'procedural' rules. They rely in large part on the Court's decision in The Harrisburg v. Rickards, 119 U.S. 199, in which it was stated, with respect to state wrongful death statutes.

> 'The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.' Id., at 214.

In The Harrisburg, however, the Court dealt with a situation where a plaintiff who was invoking the maritime jurisdiction of a federal court sought relief under a state statute providing for substantive liability. The Court held that when a litigant in a federal court asserted a cause of action based upon a state statute

he was bound by the limitation period contained within that Statute rather than by a federal time limit. Cf. Guaranty Trust Co. v. York, 326 U.S. 99. But the Court in The Harrisburg did not purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be tolled. As we said in Burnett, supra, 'While the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled.' 380 U.S. at 427 n. 2. The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme.

In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground. In Burnett v. New York Central R. Co., supra, a railroad employee claiming rights under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., initially brought suit in a state court within the three-year time limitation specifically imposed by § 56 of the Act. The state proceeding was subsequently dismissed because of improper venue. Immediately after the dismissal, but also after the running of

the limitation period, the employee attempted to bring suit in federal court. Reversing determinations of the District Court and the Court of Appeals that the federal suit was time barred, the Court held that the commencement of the state suit fulfilled the policies of repose and certainty inherent in the limitations provisions and tolled the running of the period. See also Herb v. Pitcairn, 325 U.S. 77.

Similarly, in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, or because of fraudulent concealment, Holmberg v. Armbrecht, 327 U.S. 392, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant. In Glus, supra, the Court specifically rejected a contention by the defendant that when the time limitation is an integral part of a new cause of action . . . that cause is irretrievably lost at the end of the statutory period. 359 U.S., at 232. To the contrary, the Court found that the strict command of the limitation period provided in the federal statute was to be suspended by consideration '(d) eeply rooted in our jurisprudence.' Ibid.

These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution

of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

(footnotes omitted)